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THE ARBITRATION JOURNAL

PUBLISHED BY THE
AMERICAN ARBITRATION ASSOCIATION
IN COLLABORATION WITH THE
CHAMBER OF COMMERCE OF THE STATE OF NEW YORK
AND THE
INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION

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THE ARBITRATION JOURNAL

VOL. 3 JULY, 1939 NO. 3

IN THIS ISSUE

FORCE is again on the march and new governmental alliances are being celebrated with military pomp and power. At the same time, in less spectacular fashion and without the glare of world publicity, important commercial alliances and friendships are being formed, under the banner of "World Peace through World Trade". A number of them are described in the Foreword to this issue, and on pp. 208, 209 and 210.

Mr. Watson, on p. 211, presents the Inter-American Commercial Arbitration Commission, the second link in the chain of commercial goodwill being forged on the Western Hemisphere, and the third in the series of articles on the American Design for Peace.

Although the settlement of the threatened railroad strike of 1938 is no longer news, the description of the mediation machinery which kept down the controversial steam is of interest because of the widespread demand that it be extended to other industries (p. 229).

To the series of articles on industrial peace machinery, this issue adds that of the coat and suit industry, presented by its Impartial Chairman on p. 224.

The Polish Bar has a unique system of arbitration, designed to avoid the bringing of disputes involving the professional conduct of its members before the State Courts. Its story is told on p. 244 by the JOURNAL'S collaborator for Poland.

The opening of a center at the New York World's Fair, dedicated to foreign commerce, and its possibilities for promoting international friendship and goodwill, are described by Miss Kellor on p. 247.

The legal structure and practical operation of international cartels have received comparatively little attention in this country, and the JOURNAL is glad to present an interesting account of these international agreements by Dr. Friedlaender, a well-known authority on the subject (p. 271).

In the Law Section will be found a timely discussion of a recent amendment to the New York Arbitration Law, having to do with the Commencement of Arbitration Proceedings without a Court Order. It is presented by Mr. Nordlinger (p. 279), who has made outstanding contributions to the improvement of arbitration law and practice.

The efforts of far-away Southern Rhodesia to improve its arbitration law and encourage the practice of arbitration are set forth by Mr. Barbour, another collaborator of the JOURNAL (p. 251).

FOREWORD

IN a world in which economic relations are often the cause of misunderstandings and war and in which political peace machinery is striving against tremendous odds to reduce international disturbances, no greater contribution can be made to the orderly development of international peace than by supplementing political peace machinery with economic peace machinery, operating through private contracts and trade agreements, thus fortifying trade channels against disputes and ill-will.

A little over a year ago the American Arbitration Association announced a program under which it was taking the initiative in expanding and strengthening economic peace machinery along American trade routes through the establishment in the United States of foreign trade tribunals and services, its purpose being to fortify these trade routes against ill-will and controversies by arbitration services at each strategic point through a three-fold plan which included: the establishment and maintenance of machinery for the effective settlement of controversies; the maintenance of outposts for peaceful change through which danger might be foreseen and averted; and the creation of educational centers for practical information and instruction.

Much remains to be done to bring the Association's program to completion and to its highest point of usefulness. But much also has been accomplished in the comparatively short period of time covered by these efforts, both in the actual establishment of these foreign trade tribunals and services and in the vast amount of educational work necessary to lay the foundation for their construction. In this Foreword an attempt will be made to give a brief summary of these accomplishments.

As a foundation for this program, the Association used its National Arbitration System, maintained for the adjudication of controversies and claims arising out of domestic and interstate trade, with facilities in 1,600 cities and a National Panel of 7,000 arbitrators, standard rules operative throughout the country and a central administrative organization.

Inter-American Service. As the first step in the completion of its program, the Association, in collaboration with the Pan American Union and the Council on Inter-American Relations,

established, some six years ago, the Inter-American Commercial Arbitration Commission, which embraced in its membership representatives of each of the American Republics. The organization, administration and activities of the Commission are described in an article in this issue by Mr. Thomas J. Watson, its Chairman, and need not be further covered here, except to say that the extension of its machinery is proceeding steadily and its facilities are recognized and used increasingly.

International Chamber of Commerce Service. The Court of Arbitration of the International Chamber, established in 1923, has not been used to a high degree by American foreign trade interests, chiefly because of procedural difficulties heretofore existing. The successful conclusion of negotiations between the Chamber and the Association, announced in the preceding issue of the JOURNAL (p. 118) has solved these difficulties and makes the facilities of the Chamber's Court of Arbitration fully accessible to business men in the United States.

Canadian-American Tribunal. Canadian-American trade relations, offering an illustration of the need of new arbitration machinery, will be served by a Canadian-American Arbitration Commission, recently established through the collaboration of the Canadian Chamber of Commerce and the Association, the details of which are announced in this issue (p. 263). The establishment of this service will supplement the American National System and the Inter-American System, giving the western hemisphere a complete Foreign Trade Arbitration Service.

British-American Trade Service. In this field the task of the Association has been to bring about a wider knowledge of the arbitration facilities of such groups as the London Chamber of Commerce and the Federation of Chambers of Commerce of the British Empire among American business men. Some years ago these arbitration services were supplemented by a collaborative arrangement entered into by the American Chamber of Commerce in London and the American Arbitration Association. Also announced in this issue (p. 264) is a further extension of arbitration machinery available to those engaged in Anglo-American trade, through the joint efforts of the Manchester Chamber of Commerce and the Association.

Pacific Trade Service. While the Pacific area trade routes are not at present fortified by any economic peace machinery, the Association has opened negotiations with the Chamber of Commerce of the Philippine Islands, whose friendly cooperation it is receiving in a project to establish an arbitration service between the United States and the Philippine Islands, announcement of the completion of which the Association hopes to make in the near future.

Extension of Powers of Permanent Court of Arbitration. The Permanent Court of Arbitration, established at The Hague under the Conventions of 1899 and 1907, with a complete service for the arbitration of claims in matters in which one of the parties is a State, has authorized the American Arbitration Association to state that the International Bureau of the Court is willing to place its facilities at the disposal of any American National in the arbitration of a controversy in which the other party is a Contracting Power of the Convention, either under the Rules of the Court or those approved by the parties. With the wider use of foreign trade contracts to which a government is a party and with the increasing ownership of resources and manufactures by a State, a government is increasingly a party to these contracts. This participation makes it both practical and possible to use the facilities of the Permanent Court of Arbitration at The Hague in this constantly widening field.

These foreign trade arbitration tribunals and services, when fully established, will make it possible for American nationals engaged in foreign trade to choose arbitration as the method of adjusting controversies which may arise along American trade routes, in the belief that the adjustment of claims on the basis of justice, impartiality and expediency is in keeping with the spirit of economic peace machinery and contributes incalculably to world trade and world peace.

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THE INTER-AMERICAN COMMERCIAL ARBITRATION COMMISSION *

BY

THOMAS J. WATSON †

THE Inter-American Commercial Arbitration Commission, the second link in the chain of commercial peace being forged on the Western Hemisphere, has established and maintains an inter-American system of tribunals for the voluntary arbitration of all controversies arising between the nationals of the different American Republics. It is a concrete and practical illustration of the support business men throughout the Americas are giving to the "Good Neighbor" Policy, for it embraces the twenty-one Republics and provides goodwill and peace machinery serving the commercial relations of all of them.

This system of tribunals is administered in conjunction with the local trade and commercial tribunals or facilities in each Republic through local administrative committees and in conformity with the arbitration laws of the different Republics, as set forth in the *Study on Commercial Arbitration in the American Republics*, presented as Document No. 2 to the Seventh International Conference of American States.

* THE JOURNAL presents, as the third of a series of articles constituting the American Design for Peace, this description of the Inter-American Commercial Arbitration Commission, the establishment of which was authorized by the Governing Board of the Pan American Union, following Resolution XLI of the Seventh International Conference of American States.

† President, International Business Machines Corporation; Chairman, Inter-American Commercial Arbitration Commission.

Authorization and Standards. In 1915, the representatives of the American Republics, meeting in the First Pan American Financial Conference at Washington, advanced the idea of an inter-American system of commercial arbitration and expressed their belief in the amicable settlement of commercial controversies as a method of promoting trade and of maintaining friendly and neighborly relations between the Republics. In 1934, the Pan American Union gave practical realization to that idea by authorizing the establishment of the Inter-American Commercial Arbitration Commission under Resolution XLI, adopted by the Seventh International Conference of American States. This resolution provided as follows:

> "THAT, with a view to establishing closer relations among the commercial associations of the Americas, entirely independent of official control, an inter-American agency be appointed, in order to represent the commercial interests of all Republics and to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration."

In that Resolution the Conference pointed out that the following approximation of standards in matters of procedure or of practice are deemed essential, in rules and regulations used by trade and commercial organizations, to the successful functioning of an American system:

a. Agreements to arbitrate, whether relating to existing or future controversies, to be valid and enforceable, and where enforcement is not provided for by law, trade discipline is to be provided.

b. Parties to have the power to designate arbitrators and to fill such vacancies or to provide a method therefor.

c. Proceedings by *de facto* arbitrators to be more precisely defined by the parties or organization under whose auspices the arbitration is to be held.

d. The full impartiality of the arbitrator to be provided for, with the right of challenge or removal, by the organization under whose auspices the arbitration is being conducted, in a manner provided for in the rules or regulations governing the proceedings.

e. An uneven number of arbitrators to be provided for under the rules, all of whom are to participate in the proceedings from the beginning.

f. Awards in all instances to be unanimous or by majority vote.

g. Waiver of the right of appeal to be provided for in the rules, which shall be binding on the parties, and which will limit the ground for appeal to procedural matters and to such questions of law as both parties agree to submit to the court.

h. The wider use of discipline by the organization whose members participate in an arbitration and refuse to abide by the award, where the law is inadequate to compel performance of the terms of the award.

Organization and Administration. To carry out these purposes, the Inter-American Commercial Arbitration Commission was organized as an administrative agency by action of the Governing Board of the Pan American Union on April 4, 1934. At that time the Governing Board adopted a Resolution authorizing the American Arbitration Association and the Council on Inter-American Relations jointly to undertake the organization of this Commission. Later, upon the dissolution of the Council, the Association was authorized to continue this work of organization.

The Commission is composed of representatives of each of the American Republics, and is governed by an Executive Committee of nine members, under a Constitution and By-Laws adopted in 1934. Under its Constitution, the functions of the Commission are strictly limited to the settlement of controversies between the nationals of the different Republics and to educational work in making better known the facilities of the Commission and the advantages of arbitration for promoting goodwill and friendship between the Republics through the medium of trade channels and commercial relations.

The first Chairman of the Commission was the Hon. Spruille Braden, who was later appointed as Special Ambassador of the United States to the Chaco Peace Conference and, in August, 1939, as the representative of President Roosevelt in the Chaco Arbitration. These appointments brought the Commission, through its Chairman, in touch with matters affecting not only the commercial, but also the political peace of the Americas. Upon the occasion of Mr. Braden's appointment as United States Ambassador to Colombia and his departure to take up his new duties, he became Honorary Chairman, and was succeeded by the writer as Chairman. Serving as Vice-Chairmen of the Commission are: Excmo. Dr. Ramón S. Castillo, Excmo. Miguel López Pumarejo and Dr. Vicente Vita. The Secretary-Treasurer is Herman G. Brock, Vice-President of the Guaranty Trust Company of New York.

Three sub-committees have been appointed to assist the Commission. These include an Arbitration Law Committee, under the chairmanship of Phanor J. Eder, organized to study the arbi-

tration laws of the different Republics and to promote the standards of arbitration approved by the Seventh International Conference of American States; an Advisory Committee on Education and Publicity, under the chairmanship of José Camprubí, and a Special Committee on Banking, under the chairmanship of Herman G. Brock, organized for the purpose of encouraging the use of arbitration clauses in inter-American contracts among the customers of foreign departments of banks.

The headquarters of the Commission are at 8 West 40th Street in New York City.

Local Administrative Committees. In each Republic the Commission, in accordance with its authorization under the Constitution, has established or is in process of organizing local Administrative Committees. In conjunction with these committees, local panels of arbitrators are set up for service when called upon. The committees also provide educational facilities in their respective countries and have the responsibility of improving arbitration laws so as to put into effect the standards established by the Seventh International Conference of American States.

The Republics which, to date, have established National Committees are Argentina, Brazil, Chile, Colombia, Guatemala, Mexico, Peru, Venezuela and the United States. In the remaining Republics the preliminary organization is in varying stages of progress.

Standard Rules. One of the first functions of the Commission was the drafting of Standard Arbitration Rules. Prepared by the Law Committee, under the chairmanship of Phanor J. Eder, they were approved by the Commission at its meeting on November 13, 1934. They are available in English, Spanish and Portuguese.

The Rules have been drafted in a sufficiently elastic form to be applicable under the arbitration laws of any of the Republics. Instructions for proceeding under the Rules follow:

It is necessary for the parties voluntarily and mutually to agree in writing to submit a matter to arbitration. The Commission, when called upon to do so by the parties, will facilitate the making of this agreement in the proper form.

An arbitration agreement may be inserted in a written contract at the time it is made, providing for the arbitration of disputes arising subsequently under the contract. Under the United

States Arbitration Law and under 13 State Laws in the United States and under the Law of the Republic of Colombia, such an arbitration provision is specifically recognized as valid and enforceable. Under the Laws of other Republics it is necessary to supplement such a clause by a written agreement to submit the existing controversy to arbitration. However, the inclusion of an arbitration clause in contracts usually is regarded as a moral obligation on the part of the respective parties to submit their disputes to arbitration, and the clause greatly facilitates the submission of an existing controversy. A standard form of arbitration clause is provided by the Commission.

An arbitration agreement may be made when the dispute arises, and this takes the form of a written submission signed by the parties in the manner required by the prevailing arbitration law. Such submission will be prepared by the Commission upon request of a party.

A party desiring arbitration may communicate with the Commission (or with the Secretary of its local committee where such committee has been established). Such communication should contain: (a) the names and addresses of both parties; (b) a brief statement of the controversy; (c) a copy of the arbitration clause or submission, if any exists, or a copy of any letter or statement indicating that the opposing party has consented to arbitration.

Unless the parties specifically agree upon the arbitrators or the method of their selection, they will be mutually selected by the parties from the panels or other lists of the Commission. The Commission will, upon receipt of the communication from the party desiring arbitration, mail to both parties simultaneously identical lists of suggested arbitrators. The parties may challenge one-third of the lists without giving reasons and may, in addition, for stated reasons, challenge any other names on the lists. The lists are returnable within 30 days from the time of their mailing, or within a time to be determined by the Commission, where the distances are such that a period of 30 days is insufficient. From the names remaining on the identical lists the Arbitration Committee will then select the required number of arbitrators.

When parties select their own arbitrators, independently of the panels, they are cautioned against selecting partisans or advocates, as under the Rules arbitrators may not serve if challenged

on the ground of bias and if the fact of bias is sustained. Also, under the prevailing arbitration laws, the validity of the award may be challenged upon the ground of bias.

When the arbitrators have been duly selected or appointed, the parties are given at least 10 days' written notice of the time and place of the hearing. In fixing the date of the hearing, the Commission consults the convenience of the parties and of the arbitrators.

The Rules also provide an alternative method for the arbitration of a controversy by written statements. When the parties are at considerable distance from each other and they do not desire to incur the expense of attending a hearing, they may submit the entire matter by affidavits and exhibits or other documentary evidence.

The arbitrators, after the close of the hearings, have 30 days in which to make their award. A duplicate original of the award is forwarded to each party.

Under the Rules the parties are deemed to have waived the right of appeal from the award of the arbitrators, except upon questions of procedure and as to such questions of law as both parties may agree to submit to the Court, insofar as such waiver may be lawful under the prevailing arbitration law.

Arbitration Clause. In the belief that the surest way of obtaining an amicable and speedy settlement of a dispute, when it arises, is to insert an arbitration clause in the commercial contract, the Commission has approved the following standard form which it recommends for use in such contracts:

> "Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration, in accordance with the Rules, then obtaining, of the Inter-American Commercial Arbitration Commission. This agreement shall be enforceable and judgment upon any award rendered by all or a majority of the arbitrators may be entered in any court having jurisdiction. The arbitration shall be held in ———————— or wherever jurisdiction may be obtained over the parties."

In presenting this clause, the Commission observes that the legal effectiveness of a clause may depend upon the ability of the appropriate court to obtain jurisdiction over the parties. It is suggested, therefore, that the clause include an additional provision in which the party or parties name an attorney-in-fact,

resident within the Republic whose laws govern the arbitration, to accept service of papers in any arbitration proceedings authorized under the agreement.

Education. At the time of its inauguration, the Commission realized that most of its preliminary efforts would be educational, first, in interesting the leaders in each Republic to collaborate in setting up machinery and in harmonizing existing arbitration laws with the Standards approved by the Seventh International Conference of American States; and, second, in interesting the business men and members of the Bar in using these facilities. This has meant the issuance of much technical information, as well as extensive general education in arbitration itself and how to use it. Creating the habit of arbitration through the use of clauses has been a main objective of the Commission's work. The wide distribution of the standard arbitration clause of the Commission through such organizations as the Pan American Airways, the Grace Line and others has been most helpful.

Following the Convention concerning Peaceful Orientation of Public Instruction adopted at the Inter-American Conference for the Maintenance of Peace, at Buenos Aires, in December 1936, the Commission was authorized by the Pan American Union to undertake a study in the United States, with a view toward assembling information on such instruction from institutions of higher learning. An inquiry was conducted, during the winter of 1937-38, and over 200 universities, colleges, law schools, educational and peace organizations sent replies to a questionnaire. A preliminary analysis of the material so collected indicates that there is a great diversity in such instruction, and a desire for unification and more easily obtainable source material prevails. The Commission expects to continue and complete the survey and to submit it for consideration to the Pan American Union.

Settlement of Commercial Controversies. During these years of organization, with the gradual spreading of knowledge concerning the facilities of the Commission, frequent inquiries have been received as to the possibility of submitting matters to arbitration. The Commission has been fortunate enough to cooperate in the adjustment of a number of controversies involving misunderstandings concerning the shipment of merchandise

purchased either by Latin American merchants from exporters in the United States, or by importers in the United States from firms in various Latin American countries. In these instances the Commission has had the excellent cooperation of the foreign trade sections of local chambers of commerce and of local exporters' associations in the United States and of members of the Commission and its committees in the various Republics, with the result that the differences could be adjusted without the necessity of resort to arbitration.

In some instances it was found that a controversy, creating much rancour, had arisen due to a misunderstanding, such as, for example, a claim of a United States exporter against a Latin American firm for payment of merchandise which the latter firm claimed had never been received. After an exchange of letters through the Commission, the firm in the United States made an examination of its own shipping department and discovered that, through an error, the merchandise had never been shipped. Had it not been for the availability of a friendly intermediary, such as the Commission, there would have been a break in commercial relations between the parties.

Occasionally controversies involving Latin American merchandise are submitted to arbitration in the United States under the Rules of the American Arbitration Association, the national organization in the United States for the conduct and development of arbitration. This occurs in instances where a Latin American exporter is represented by an agent in the United States and where resort to the Association serves to save time and assures the parties of an immediate verbal hearing. This method has been found particularly satisfactory in the fur trade, where it is a regularly adopted procedure. The inter-American panel of arbitrators of the Commission is made available to the American Arbitration Association for controversies involving such Latin American interests.

In a number of instances, when the Commission was called upon by one party to act, the absence of an agreement to arbitrate and the unwillingness of the opposing party to consent to arbitration prevented the settlement of the controversy. In these instances an arbitration clause in a contract might have saved thousands of dollars and long delays in the disposal of merchandise and in the release of funds.

It is, therefore, particularly encouraging that the Commission is receiving, in an increasing number, notices or advices concerning firms and corporations which are incorporating the standard arbitration clause, recommended by the Commission, in their contracts.

It is believed that with the continuation of the educational work of the Commission and the resulting improvement in arbitration laws and increasing use of arbitration clauses, the Commission will be in a position to render increasingly valuable services in inter-American commerce and play an important rôle in the widespread efforts to bring about "World Peace through World Trade".

NOTES AND COMMENT

Tribute to Charles T. Gwynne. The Chamber of Commerce of the State of New York, which maintains the oldest arbitration tribunal in the United States as one of its many activities, recently paid a tribute to Charles T. Gwynne, its Executive Vice President, to mark the completion of 45 years of service with the organization. In a brief speech commemorating the occasion, Richard W. Lawrence, Vice President of the Chamber, said: "Colonel Gwynne has served this body as well as any human being possibly could, in every responsibility that has ever been placed upon his shoulders, as only those of us fully know who have occupied my present position and who have functioned in the Chamber intimately."

The JOURNAL is happy to take this occasion to felicitate Colonel Gwynne and to congratulate the Chamber upon having had for so long his able direction.

Hague Court Facilities Extended to Contracts between American Nationals and Foreign States. The American Arbitration Association has been authorized by the International Bureau of the Permanent Court of Arbitration at The Hague to recommend to American business concerns the inclusion of an arbitration clause in their contracts with foreign governments, providing that commercial controversies arising out of such agreements be settled by The Hague Tribunal as soon as they arise.

The clause formulated by the Association and approved by the governing body of the Court follows:

> "Any controversy or claim, arising out of or relating to this contract, shall be settled by arbitration by the institution of a special board of arbitration sitting at The Hague, under the Rules of the Permanent Court of Arbitration, or such other rules as the parties may agree upon."

It will be noted that, under this clause, either the Rules of the Permanent Court of Arbitration or those approved by the parties are applicable.

In a statement announcing the extension of arbitration facilities at the disposal of American nationals, in contracts to which foreign states are parties, Lucius R. Eastman, Chairman of the Board of the Association, called attention to the increasing number of contracts being entered into between a national of one country and the government of another and stressed the fact that the number of such contracts will grow as more and more resources and manufactures come under the ownership or control of states.

Arbitration Committee of New York Bar Headed by Ralph S. Rounds. Announcement was made on July 9, 1939, of the appointment of Ralph S. Rounds, of the New York law firm of Rounds, Dillingham, Mead & Neagle, as chairman of the Committee on Arbitration of the Association of the Bar of the City of New York. Mr. Rounds succeeds H. H. Nordlinger, under whose chairmanship the Committee has made many outstanding contributions to the improvement of the New York Arbitration Law and the wider practice of arbitration generally. Mr. Rounds is a member of the Advisory Committee on Commercial Arbitration of THE ARBITRATION JOURNAL and a member of the New York Panel of Arbitrators of the American Arbitration Association.

Arbitration of Accident Cases. During the month of June, 1939, 149 cases were submitted to the special Tribunal of the American Arbitration Association which functions in the arbitration of personal injury and property damage claims, under a Special Committee of Lawyers established in 1933 for the purpose of relieving congestion in the lower courts of New York City, bringing the total number of such cases submitted during this six-year period to 7,910.

These cases have come from attorneys for plaintiffs and from insurance companies representing defendants in damage claims, 47 of the leading New York casualty insurance companies having cooperated with the Special Committee of Lawyers in its arbitration activities. Every case arbitrated means its removal from the court calendars and a consequent saving to tax-payers of the cost of its trial in the courts.

The records of the Tribunal disclose that 1,290 cases were disposed of by awards of arbitrators and 3,061 by settlements arrived at by the parties after the matter was submitted for arbitration, while in 3,278 matters one of the parties refused to consent to arbitration and the matter continued on the calendar of the court in which it was pending.

Removal of an Arbitrator. In preceding issues of the JOURNAL [1] there have been discussions of an incident of the removal of an arbitrator in a shipping dispute, by an order of a King's Bench Divisional Court (England), on the ground that he had conducted himself unfairly and without impartiality between the parties. In a statement denying the allegedly biased remarks attributed to him and criticising the procedure adopted in removing him without giving him an opportunity to meet the charges against him or to defend his conduct, the arbitrator declared that his first knowledge of the words he was supposed to have used was gained from the press.

In the Arbitration Law section of this issue of the JOURNAL (p. 292), there is a review of a decision of the U. S. Circuit Court of Appeals—Second Circuit, in an appeal from a decree denying the application of claimants to vacate or reduce awards made to certain other claimants, in connection with the sinking of the S. S. "Morro Castle" in September, 1934, in which a claim of unfairness and partiality on the part of the arbitrators was also made. In holding that the issue of alleged partiality could not be decided upon affidavits, but should be returned for trial before a judge or a commissioner, the court said:

> "It is essential that the consciences of the arbitrators be searched by cross-examination and that they should be free to defend their conduct."

Report of Actors' Equity Association on Year's Arbitrations. The 14th Annual Report of Actors' Equity Association on arbitra-

[1] Vol. 2, No. 4 (p. 416); Vol. 3, No. 1 (p. 74); Vol. 3, No. 2 (p. 171).

tions conducted on its behalf by the American Arbitration Association for the fiscal year commencing April 1, 1938 and ending March 31, 1939,[1] contains the following endorsement of arbitration by one of the pioneering organizations in its practice:

> "Each year brings us increasing proof of the merit of the system of arbitration, and we are proud that Equity was the pioneer."

The report continues:

> "According to the report of the American Arbitration Association, filed with Actors' Equity Association for the fiscal year commencing April 1, 1938, and terminating April 1, 1939, there were sixteen arbitrations instituted during that period; three arbitrations were pending from the previous year, making a total of nineteen arbitrations. Most of these were individual and not company claims and involved a total of thirty-five members.
>
> "Ten of the cases involved proceeded to hearing and determination and in each case resulted in an award in favor of our members. Six cases were settled favorably to our members after the claims were filed with the American Arbitration Association, but before hearings were held. Two cases were withdrawn and one is still pending because we have not been able to get the company together to attend a hearing. Of the ten cases which proceeded to hearing and award, six were determined by sole arbitrators and four were heard and determined by boards of three arbitrators.
>
> "The total amount involved in these arbitrations was $11,911.35. Some of these cases, however, did not involve a specific sum of money but involved a determination of rights springing out of Standard Equity contracts.
>
> "In addition to the above cases, the Legal Department also handled sixteen major cases involving approximately $20,000 and affecting the rights of one hundred and thirty members. These were amicably adjusted upon a mere oral or informal demand for arbitration but without the necessity of instituting arbitration proceedings with the American Arbitration Association. While it required much patience and many conferences to settle these cases, we feel that they were made possible primarily because Equity maintains a regular system of arbitration and the parties involved in the dispute know that they cannot take these cases to court and protract the litigation for years, but that each case must be settled amicably or arbitrated promptly."

Furnace Manufacturers Consider Arbitration. The ninth annual meeting of the Industrial Furnace Manufacturers Association, held at Briarcliff Manor, New York, June 19-20, had on its agenda a study of the possibilities of a wider application of arbitration to

[1] Published in *Equity*, official organ of Actors' Equity Association, for June, 1939.

disputes between members of the Association and between members and their customers.

The discussion was led by J. A. Doyle, retiring president of the Association, who pointed out to the manufacturers the advantages resulting from the use of arbitration, its availability under various state laws and the U. S. Arbitration law, and the possibility of appealing to the State Supreme Courts in cases where arbitration failed in its objective. The successful use of arbitration in the contracts of the American Institute of Architects, in the cloak and suit industry and in the building and construction field was cited by Mr. Doyle, who declared that problems in these industries are no less complicated than those of the furnace manufacturers. The manufacturers were also urged to consider the application of arbitration to industrial relations with their employees.

AMERICAN INDUSTRIAL ARBITRATION*

Advisory Committee: *George W. Alger, John B. Andrews, Dorothy S. Backer, Louis B. Boudin, C. S. Ching, Evans Clark, William C. Dickerman, Mary E. Dreier, Herman A. Gray, Milton Handler, William J. Mack, George Meany, Benjamin H. Namm, Anna M. Rosenberg, Frank H. Sommer, A. D. Whiteside, Sidney A. Wolff, Burton A. Zorn.*

THE IMPARTIAL MACHINERY OF THE COAT AND SUIT INDUSTRY

BY

SOL A. ROSENBLATT †

THE women's coat and suit industry in the New York Metropolitan Area, which employs 40,000 workers and whose annual production is upwards of $200,000,000, has been operating under collective agreements since 1910. During the 29 years which have elapsed since that time, except for three years from 1916 to 1919, the collective agreements have prohibited strikes and lockouts and provided impartial machinery for the settlement of disputes. Collective relations have advanced to such an extent that the industry has been free from the destructive effects of general strikes and lockouts since 1926.

Historical Development. The impartial machinery in this industry has passed through a number of stages. In the beginning it consisted of a board of arbitration of three individuals, one representing the public, one the employers, and one the employees. This was later modified to provide for an impartial chairman to be selected from a panel previously agreed upon. The present system under which a permanent impartial chairman is appointed for the period of the agreement was established in 1924. Since

* Court decisions relating to industrial arbitration will be found in the section on Arbitration Law, beginning on p. 283, references to industrial arbitration in foreign countries will be found in the section on International and Foreign Arbitration, p. 254.

† Impartial Chairman, Cloak, Suit and Skirt Industries.

1926, the powers of the impartial chairman have been extended, permitting him, either on complaint or on his own initiative, to employ accountants to investigate the books and records of firms to ascertain whether they are living up to the agreement.

In 1924, upon recommendation of the Governor's Advisory Commission, Raymond V. Ingersoll became the first permanent Impartial Chairman. He was succeeded in 1931 by George W. Alger, who served until 1935. Since that time, the writer has occupied this position.

The Impartial Machinery. Under the present collective agreements the Impartial Chairman is appointed by the parties, or failing agreement, by the Governor of the State.[1]

The procedure outlined in the agreements for the settlement of disputes requires the filing of a complaint by the aggrieved party with the other party; a joint investigation and effort at adjustment by the manager of the Union and the Executive Director of the Employers' Association involved, or their deputies; and failing agreement, the matter is cited before the Impartial Chairman. Adjustments reached by agreement of the parties, or decisions rendered by the Impartial Chairman, are final and binding upon the parties. Failure to comply therewith, within 48 hours, results in loss of all rights and privileges under the agreement.

Liquidated damages may be imposed on a firm for violations by agreement of the parties or by the Impartial Chairman. The amount of damages assessed by the Impartial Chairman is turned over to him for the purpose of defraying part of the expenses of his office, except such amounts as are imposed to remunerate workers who have sustained damages, which sums are turned over to the Union for distribution to the workers.

Resort to strikes and lockouts is forbidden except, of course, where failure to comply with a decision results in loss of all rights and privileges under the agreement. Where a strike or lockout occurs in violation of the agreement, the workers must

[1] Four Associations represent the employers: the Industrial Council of Cloak, Suit and Skirt Mfrs., Inc.; The Merchants Ladies' Garment Association; Infants and Children's Coat Association, and The American Cloak and Suit Mfrs. Association. The workers are represented by the Joint Board of Cloak, Suit and Reefer Makers' Union of the International Ladies' Garment Workers Union.

be returned to work within 24 hours after notice by one party to the other, otherwise the workers, in the event of a strike, are deemed to have abandoned their employment and the employer, in the event of a lockout, is considered to have forfeited his rights under the agreement. Should the number of "stoppages" or lockouts be "substantial", as determined by the Impartial Chairman, the agreement may be terminated by the adversely affected party.

The hearings before the Impartial Chairman are held upon notice to all interested parties. They are conducted in an informal atmosphere. The restraint so often apparent in a court of law is absent. Common law or statutory rules of evidence are disregarded. Each side has full liberty to present its case, to be represented by counsel if it so desires, and to examine and cross-examine witnesses. In general, the object is to obtain all the facts necessary to establish the rights of the parties.

By the expressed terms of the collective agreements, each case must be considered on its own merits and no case establishes a precedent for a decision in another case. The decision must be rendered on the basis of the contract. By stripping decisions of any authority as precedents it was intended to avoid the stultifying effect of excessive reliance on *stare decisis* by permitting constant re-examination of issues in the light of changing conditions. In practice, however, the effect of a decision covering a particular point in dispute has been to bring about its application by the parties themselves to other disputes involving the same point.

It should, moreover, be borne in mind that the impartial machinery is not a form of conciliation, where the result is in the nature of a compromise, but is one in which a decision must be rendered on the basis of the rights of the parties as circumscribed by the contract itself.

Finally, decisions of the Impartial Chairman are, by the terms of the collective agreements, deemed awards rendered in accordance with the Arbitration Law of the State of New York. Upon the filing of such decision in a court of law, it becomes a judgment upon which execution may be issued.

Procedure for Settlement of Disputes. Disputes that arise are many and varied. They originate in a complaint filed by one of the parties against the other. Where violations are suspected a party may request the Impartial Chairman to conduct an inves-

tigation. Experienced accountants, trained in the methods employed in the industry and familiar with its problems, are assigned to make investigations. They have broad powers to examine books and records.

A complaint may be filed by the Union against one of the employers' associations, or by an employers' association against the Union, or one of the employers' associations may file a complaint against another. Complaints filed by the Union may deal with a discharge, wage underpayment, non-union and non-designated work, etc. A dispute arising out of a complaint by an employers' association may originate in a stoppage of work, a refusal of the Union to agree to a reorganization of the working force of the firm due to changed business circumstances, etc. Complaints between associations may arise when a designated contractor claims that the jobber has sent work to non-designated contractors, or a jobber may desire the removal of a designated contractor upon the grounds of incompetency or due to curtailment of business.

The procedure by which disputes are handled involves a number of steps. In the case of a dispute between a worker and his employer, for example, the procedure is as follows:

(1) The Shop Chairman attempts to adjust the matter.

(2) If he fails, the worker or the Shop Chairman presents his grievances to his Local Union or Joint Board, giving all the facts to a complaint clerk. A complaint card is filed in the Union Office and the Business Agent in charge of the shop in question is assigned to handle this matter.

(3) The complaint is filed with the Employers' Association of which the employer is a member and is taken up by the employer's representative and the Union representative.

(4) Should an adjustment fail to be reached by the Business Agent representing the Union and the representative of the Association, the matter is referred to the Department Head or, if important enough, to the General Manager of the Union to adjust with the Executive Director of the Association.

(5) Should they reach an agreement, its terms are formally accepted and the matter is closed.

(6) Should they fail to reach an agreement, the matter then comes before the Impartial Chairman upon complaint of the Union or the Association, as the case may be, which files a letter outlining the nature of the complaint and requesting a hearing.

(7) The case is then set for a hearing at which all sides are given an opportunity to present their case.

(8) After the hearing, the Impartial Chairman renders a decision, which must be in accordance with the contract.

(9) The decision is final and binding on all parties and must be complied with within 48 hours, otherwise all rights and privileges under the contract are forfeited. (This 48-hour provision likewise applies to settlements reached by the Union and the Employers' representatives.)

Disposition of Cases—Compliance. Most of the complaints which arise are settled or adjusted by the parties themselves. Comparatively few reach the Impartial Chairman's office. For example, although 625 cases were submitted to the Impartial Chairman betwen July 1, 1935, and June 30, 1938, the Union complaints alone during that period totaled 13,784. Moreover, out of the total of 625 cases which came before the Impartial Chairman between 1935 and 1938, 415 were withdrawn or settled before hearing, decisions being rendered in the balance of the cases.

The Employers' Associations and the Union have consistently abided by the decisions of the Impartial Chairman. Cases, however, in which an individual employer or workers in a particular shop failed to comply with a decision have occurred, but they are few in number. For example, between 1935 and 1938, only 29 cases cited before the Impartial Chairman involved non-compliance with a decision rendered by the Impartial Chairman or an adjustment reached by the parties.

Of course from time to time an individual shop strike or lockout will occur but such cases are handled with dispatch. Under the agreement, as previously stated, workers must be returned to work within 24 hours after notice in the event of a shop strike or lockout in contravention of the agreement.

Attitude of the Parties. All factors in the industry recognize that impartial machinery is indispensable for the settlement of disputes. It has become an established and accepted institution in the industry and experience has so forcibly demonstrated its value to the parties that its desirability is unquestioned. Though difficulties arise, they are handled through orderly methods of procedure and not by resort to force.

The atmosphere created by the impartial machinery, which requires representatives of employers and employees to meet daily and adjust matters in an orderly way, is also conducive to the peaceful negotiation and renewal of agreements. Though bitter strife marked the early years of collective relations, it is noteworthy that since 1926 agreements have been renewed with decreasing difficulty. Until 1937 this was generally achieved with the assistance of public officials or prominent citizens. The last agreement was, however, reached by the parties themselves without outside intervention.

The representatives of the Union and the Employers' Associations have, as a result of their experiences in collective relations, increasingly learned to appreciate each other's position, and in general to view problems that arise from a broad industrial, rather than a partisan, point of view. Thus the parties established, and have maintained since 1935, the National Coat and Suit Industry Recovery Board, which seeks to stabilize the industry and to maintain decent labor standards and fair commercial practices. This organization enlists the support of the retailer and consumer through the promotion of the Consumers' Protection Label affixed to each garment produced by member firms.

HOW RAILROADS KEEP THE PEACE *

BY

RALPH M. BLAGDEN

WHEN it comes to keeping the industrial peace, the railroads of the United States should be able to supply the Seventy-sixth Congress with a few pointers. Let Congress regard with appreciative attention the refrigeration and filtering system of the roads. Of course, that system literally identified, is composed of the special mediatory and investigatory machinery established by the Railway Act of 1926. Right now that machinery purrs a paean of contentment and success, for it has just cooled the emotions and filtered out the misunderstandings that might have distracted the nation with a major railroad strike.

A strike that did not happen should be of major importance to the lawmakers who want to perfect the labor machinery of the

* Reprinted from *The Christian Science Monitor*, of January 25, 1939, by permission of the publishers.

nation. There might be some details of that machinery worth copying. If 900,000 men had quit work on the railroads, as they threatened to do last fall, the effects would have been disastrous upon the transportation system, with almost one third of its roads in receivership and with nearly one half of its mileage unable to meet even its operating expenses and taxes. Nor is it difficult to fathom what it would have meant to have permitted 900,000 idle men to trample upon the slender sprout of recovery. The averting of that strike may, indeed, represent one of the most constructive achievements of the year. For the railroads, it may have meant salvation.

While the roads lost in their effort to save some $250,000,000 in wage reductions, they won, at least, the promise of the President that Congress would seek a comprehensive, long-range program for the relief of the carriers.

A brief recital of the recent railroad dispute furnishes an admirable study of the railroads' very special technique for maintaining peace along the tracks of the nation.

On May 12 [1938] the individual roads notified their employees that they must take a 15 per cent wage cut. Nation-wide negotiations between the Carriers' Joint Conference Committee and representatives of the Brotherhood of Railroad Trainmen began on June 30, only to end in a deadlock. The next step, as specified in the Railway Labor Act, was to invoke the services of the National Mediation Board.

This Board sat on the dispute until Aug. 31. It finally recommended that the issues should be submitted to arbitration. The roads said they were willing to comply; labor rejected the proposal. Proceedings before the Board having collapsed, both sides were compelled under the terms of the law to wait 30 more days before taking action.

Thus throughout two months of mediation and enforced waiting superheated emotions were kept in the cooling plant piped by this unique peace machinery.

In compliance with the act the carriers announced that, mediation having failed, they would institute the projected wage cuts October 1, upon the expiration of the waiting period. Union leaders replied with the announcement that labor had voted to strike.

At this point, however, the door of another federal refrigerator opened wide. The law holds that if, in the judgment of the

President, a situation exists that threatens to interrupt interstate railroad traffic, he may appoint an Emergency Board to conduct further studies and to report back to him.

Throughout October the railroads were exposed to public gaze in the hearings before the Emergency Board. J. Carter Fort, chief counsel for the carriers, argued that the roads must reduce wages in the face of shrinking income. Labor replied that there was $1,000,000 of daily waste that should be eliminated before wages were touched, and that wage reductions on the roads would precipitate a tidal wave of depressive wage cuts in industry generally.

On Oct. 29 the Board in its report to the President rejected the carriers' appeal for pay-roll relief. Savings would not be distributed so as to relieve the most needy roads—a wage cut on the railroads would counteract the wage trend in industry generally—the depression had been of too short duration to warrant such a drastic deflationary step—so the Board contended.

There was no obligation for the roads to accept the findings of this Emergency Board. All that was required of them was that they wait 30 days longer before acting. But in just one day short of a week after the Board rendered its decision the railroad executives met in Chicago and announced that they would comply with the findings of the Board. The projected wage cut was dropped; labor had no reason to strike.

It is, of course, ingenuous to claim that the railroad peace machinery is innocent of all pressure. In fact, after the Board has issued a finding and the President has called upon the loser to abide by the decision, there is a very real pressure operating in the form of public opinion. For the railroads in this instance to have disregarded both the recommendation of the Board and the appeal of the President and gone ahead with the wage reductions would have meant that they would have undertaken a struggle against stout odds. Public opinion, invariably the decisive factor in a protracted strike, would have been mobilized from the first behind the cause of labor.

Thus the peace machinery is not without its teeth and the carriers may have seen their gleam as they complied with the findings of the Emergency Board. But in those more than 90 days of enforced delay we may be assured that some constructive steps were taken both in the direction of understanding and in that of a constructive national program for the roads.

There was, of course, some grumbling. Samuel O. Dunn, editor of Railway Age, wrote of the Board's finding: "How any Board with only 30 days to consider problems that call for a life-time of sympathy and familiarity could make such a sweeping report is beyond me."

But in the main the roads accepted the decision with a calmness that certainly would have been absent if there had been evolved no prospect of compensatory relief to offset their failure to obtain wage cuts.

Reports of the hearings, with all their sharp attacks and ill-concealed exasperations, reveal a hundred points at which the disputants might logically have bolted the negotiations in anger. Yet the machinery of an orderly mediation process held them to the conference table. This machinery refines the issues until every possible nugget of understanding is preserved and every possible ash of disagreement is sifted out.

In the recent railroad crisis, however, the peace machinery achieved not merely the negative end of averting a strike but a far more positive outcome. President Roosevelt, upon the acceptance by the roads of the Emergency Board's findings, virtually pledged himself to work for some kind of constructive national program to aid the roads. Practically the only effort of the Government to devise such a program was that which resulted in the amendment of the Transportation Act of 1920. But the consolidations aimed at in this legislation failed of realization, largely because of Congress's devotion to competition.

Today, thanks to the success of those laws that averted the threatened railroad strike, there is a second opportunity provided Congress to fashion a workable transportation program.

All the major proposals for the solution of the railroad crisis —consolidations, poolings of freight and passenger traffic, equalization of competition between rail and other carriers, loans and reorganization—can now be threshed out in an atmosphere of relative moderation.

Labor generally is enthusiastic about the way the railroad peace machinery operated. That is natural, of course, in view of labor's victory. Among the employers the writer found some casual suggestions that the machinery should be amended to provide for compulsory arbitration if mediation fails, and that the strike vote should be subject to inspection by the authorities. None of

these employers, however, suggested that the peace machinery should be discarded.

Those eager to bring peace to industry generally may logically ask why similar machinery is not enacted for other economic areas. Indeed, this question may be pressed at this session of Congress. One answer, of course, is that the Federal Government has an unusually clear-cut authority over an industry so plainly interstate as transportation. The railroads are also exceptional in their long history of government regulation that has acclimated them to teamwork with Washington.

Perhaps nothing is more important in making the railroad peace machinery work justly than the fact that labor is fully organized into independent and responsible unions. Some measure of Government direction may be injected into an industry where labor and capital have ironed out their differences, at least, to the extent of making genuine collective bargaining operative. But in an industry that is still fighting to destroy unionism there would be lacking the stability and equilibrium essential to efficient mediation.

So if industry generally is to benefit from some such peace machinery as that which has served the railroads so well, it may be essential that it first call a halt to the diminishing, but still active, struggle against legitimate collective bargaining. On the foundation of equal bargaining power the installation of a de luxe refrigeration and filtering system for labor disputes might be extended in some form.

NOTES AND COMMENT

Recent State Labor Relations Laws. A number of states have recently enacted laws or amended previously existing laws governing labor relations. The following is a summary of the conciliation and arbitration features of the more important of these laws, including that of Minnesota, which permits the parties to arbitrate under the procedure of the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association:

Minnesota. The Minnesota Labor Relations Act, which became effective on April 22, 1939, relates to the "avoidance and settlement of labor disputes and the promotion of industrial peace",

creates the office of Labor Conciliator, defines his powers and duties and provides for arbitration and court procedure in labor disputes. While the division of conciliation is established within the framework of the Department of Labor and Industries, it is not in any way subject to the control of the Department, but is under the supervision and control of a labor conciliator appointed by the Governor.

Sections 4, 5, 6, 7 and 8 of the Act deal with the powers and duties of the labor conciliator and the machinery of mediation and conciliation.

Section 9 provides that "whenever a labor dispute arises which is not settled by conciliation, such dispute may, by written agreement of the parties, be submitted to arbitration on such terms as the parties may specify, including, among other methods, the arbitration procedure under the terms of Sections 9513 to 9519, inclusive, of Mason's Minnesota Statutes of 1927 . . . . and arbitration under the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association."

Vermont. Under a law enacted in Vermont and approved March 18, 1939, the State is given authority to intervene in any labor controversy, involving as few as five employees, upon notice by either employer or employee to the Commissioner of Industry of a threatened or existing strike or lockout. Upon receipt of such notice the Commissioner of Industry is required to investigate the situation and report to the Governor. In the event the latter is unable to reach a settlement of the dispute, either through his own personal mediation or that of a representative, an endeavor is made to bring the dispute to arbitration before a board containing representatives of both industry and labor. Arbitrators are given the powers of subpœna and, under the arbitration agreement between the parties, their award is final and binding and effective for six months or until sixty days' notice of its cancellation is given by either side.

Wisconsin. The Employment Peace Act, passed by the Wisconsin Legislature to replace the Wisconsin Labor Relations Act, contains the following sections concerning arbitration and mediation.

> 111.10. Arbitration. Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such

dispute, and thereupon the board shall have the power so to act. The board shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in Chapter 298 of the statutes.

111.11. Mediation. The board shall have power to appoint any competent, impartial, disinterested person to act as mediator in any labor dispute either upon its own initiative or upon the request of one of the parties to the dispute. It shall be the function of such mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the board shall have any power of compulsion in mediation proceedings. The board shall provide necessary expenses for such mediators as it may appoint, order reasonable compensation not exceeding ten dollars per day for each such mediator, and prescribe reasonable rules of procedure for such mediators.

Where the exercise of the right to strike by employees of any employer engaged in the state of Wisconsin in the production, harvesting or initial processing (the latter after leaving the farm) of any farm or dairy product produced in this state would tend to cause the destruction or serious deterioration of such product, the employees shall give to the board at least ten days' notice of their intention to strike and the board shall immediately notify the employer of the receipt of such notice. Upon receipt of such notice, the board shall take immediate steps to effect mediation, if possible. In the event of the failure of the efforts to mediate, the board shall endeavor to induce the parties to arbitrate the controversy.

Michigan. On June 8, 1939, Governor Dickinson signed the Michigan Labor Mediation Act, effective immediately, "to create a board for the mediation of labor disputes, and to prescribe its powers and duties; to provide for the creation of special mediation commissions; to regulate the conduct of parties to labor disputes", and to protect the rights and privileges of employers and employees.

Under Sec. 3 of the Act there is created a State Labor Mediation Board, with principal offices in Lansing, to consist of three members appointed by the Governor "without regard to political affiliations", with one member designated to serve as chairman of the board.

In the event a dispute arises which the parties thereto are unable to settle, no strike or lockout shall take place unless a notice thereof is served upon the board, and for a period of 5 days thereafter the parties are required to use their best efforts to avoid a cessation of employment. After receipt of the above notice, or upon its own motion in an existing or threatened labor dis-

pute, the board may and, upon direction of the Governor, must take steps to effect a voluntary, amicable and expeditious settlement of the issues between the parties, by means of conferences, negotiations or assistance in drafting agreements, or the holding of public or private hearings, for which latter purpose the board has power to administer oaths, take testimony and issue subpœnas.

The provisions of the Act do not apply to employers or employees under the jurisdiction of the Railway Labor Act nor to any dispute involving farm labor or domestic workers.

Pennsylvania. The Pennsylvania Labor Relations Act of 1937 was amended by an Act signed by the Governor on June 8, 1939, which changes in many respects the practice before the Pennsylvania Labor Relations Board, limiting its power in certain cases and requiring investigations of labor disputes and issuance of subpœnas on the application of either party to a controversy. As was the case under the provisions of the former Act, the amended Act gives no authority to the board to appoint individuals for the purposes of conciliation, mediation or arbitration, where such services may be obtained from the Department of Labor and Industry.

Procedure of Appeal Tribunal under the Social Security Act. The worker's right to appeal from a decision on his claim for out-of-work benefits, under the job-insurance laws, to an impartial tribunal as required by the Social Security Act and State unemployment insurance laws, is explained in a statement recently prepared by the Bureau of Unemployment Compensation of the Social Security Board. Usually there is opportunity for a second appeal before a board of review, both without cost to the worker; finally, if he is still not satisfied, he may take his case to the courts.

The appeal to the impartial tribunal must be filed within 5 days after the worker has been notified of the decision of the local unemployment compensation office on his claim. In some states this tribunal is appointed by the board of review, in others by the state unemployment compensation agency, and may consist of one or more members, but in no case may a member serve who has had any previous connection with the claim or with the decision which is appealed.

The hearing is informal; the claimant may appear alone or be represented by an officer or agent of his union or by an attorney, may testify and bring witnesses and may ask the tribunal to issue subpœnas to compel witnesses to attend. All testimony is taken under oath or affirmation.

Under most of the State laws, if the decision of an appeal tribunal is not unanimous, the claimant has a right to a second hearing before a board of review; if the decision was unanimous or if the case was heard by a one-man tribunal, the board of review decides whether there shall be a second hearing and, if so, whether to consider the question solely on the record of the first hearing, or to permit the worker and the employer to appear personally for argument, or merely to allow the parties to file their arguments in writing. The second appeal decision is final unless the worker decides to appeal to the courts.

Arbitration Promotes Industrial Peace. Recently an employer and the representatives of a union with whom he had a contract appeared before the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association for a hearing of the employer's claim that, under his labor agreement, he was entitled to reduce his personnel because of unfavorable business conditions. Both sides were represented by attorneys.

After the hearing had started, it was decided by the arbitrator and agreed by the parties that an examination of the employer's books would be necessary to substantiate his claim. While waiting for the production of these books and records an amicable discussion ensued between the parties, with the result that the employer withdrew his claim and agreed to continue under the contract without change. Following the settlement, the following letter was received by the Tribunal from the attorney for the employer:

> "On behalf of my client and myself, I wish to thank the Tribunal and the arbitrator for the courteous and efficient manner in which the hearing in this matter was conducted. The friendly atmosphere of your offices and the conscientious understanding of the problems between employer and employee by your Tribunal are one of the reasons for my client's withdrawing this proceeding and marking the case settled."

William M. Leiserson Appointed Member of National Labor Relations Board. William M. Leiserson, former chairman of the Na-

tional Mediation Board created by the Railway Labor Act, assumed his new duties as a member of the National Labor Relations Board on June 1, following his appointment by President Roosevelt and confirmation by the Senate, to succeed Donald W. Smith.

Mr. Leiserson has had long experience in industrial relations and is one of the country's outstanding advocates of mediation and arbitration in disputes between management and labor. He has served as chairman of boards of arbitration in the men's clothing industry in Rochester, New York, Chicago and Baltimore, as chief of the Division of Labor Administration of the U. S. Department of Labor and as chairman of the Petroleum Labor Policy Board.

In testifying before the Senate Labor Committee recently, Mr. Leiserson recommended that a system of mediation similar to that applied to railway, water and air carriers be extended to all industry, and suggested that the United States Conciliation Service be expanded to supplement the facilities of the Labor Board with machinery patterned after that in effect in the three industries mentioned.

David J. Lewis, former member of the House of Representatives, has been appointed by President Roosevelt to succeed Mr. Leiserson on the National Mediation Board. Otto S. Beyer has been designated by the Board to be its chairman for the fiscal year beginning July 1, 1939.

Gallup Poll Shows Large Majority in Favor of Federal Mediation. A nation-wide survey conducted by the American Institute of Public Opinion, of which Dr. George Gallup is director, and announced in *The New York Times* of June 11, 1939, shows that the great majority of Americans favor an automatic Federal mediation system for all disputes between employers and organized labor, such as is now in effect in the railway and maritime industries, and which has had the backing in recent months of Senator Wagner, of New York, and William M. Leiserson, newly appointed member of the National Labor Relations Board.

The question put to a carefully selected cross-section of voters in every state was: "Would you favor a law requiring employers and unions to submit their differences to a Federal labor board before a strike could be called?", to which 8 persons in every 10, or 86 per cent, answered "Yes".

Commenting editorially on the result of the poll, the *New York World-Telegram*, in its issue of June 12, 1939, says:

> "The essence of the mediation idea is that all parties in a labor dispute must submit their cases to a permanent federal board. If the board cannot suggest a way out an investigating committee is appointed by the President to study and report. That brings public opinion to bear. And all that procedure must happen before there can be a strike. It is a potent plan, proved not only in the railway and airline operations in this country, but in many countries abroad. For, by the time public opinion has expressed itself, the side that is right—whether labor or capital—wins, and the side that has the weak case yields. So the strike doesn't occur. No greater service could be rendered to labor, capital and the public than the establishment of such machinery."

New Member of New York Board of Mediation Appointed. Thomas L. Norton, of Buffalo, was appointed a member of the New York State Board of Mediation by Governor Lehman on May 16, to succeed John C. Watson, of Albany, whose term had expired. Mr. Watson, credited by Governor Lehman with an important part in the creation of the State Mediation Board, and a member since its inception, declined reappointment because of the pressure of other work.

At the same time Governor Lehman appointed Miss Mabel Leslie, of New York City, for another term.

Analysis of Strikes in 1938. An analysis of strikes which occurred in the United States in 1938, prepared by Don Q. Crowther of the Bureau of Labor Statistics, U. S. Department of Labor, and published in the *Monthly Labor Review*,[1] reveals that while the number of strikes in 1938 was greater, except for 1937, than in any year since 1920, fewer workers were involved in strikes than in any year since 1932, and there were fewer man-days of idleness because of strikes than in any year since 1931, indicating that 1938 was a year of numerous small strikes of short duration. Their average duration was 23½ calendar days, about 37 per cent of them lasting less than a week. The analysis also shows that there were only 52 sit-down strikes in 1938, as compared with 477 in 1937.

In 44 per cent of the strikes ending in 1938 (generally speaking, the smaller ones), settlements were worked out between

[1] Vol. 48, No. 5, p. 1110.

employers and representatives of workers. In 37 per cent, settlements were negotiated with the assistance of Government officials or boards, either Federal, state or local. Private conciliators or arbitrators assisted in settling 1 per cent of the strikes.

Of the 1,025 strikes which Government officials or boards assisted in settling, 989 were terminated by conciliation methods and 36 by arbitration. Of the 28 cases in which settlements were negotiated with the assistance of private conciliators or arbitrators, 11 were settled by conciliation and 17 by arbitration.

The analysis also shows that of the 2,772 strikes beginning in 1938 and involving more than 688,000 workers, half occurred in four industrial groups, the largest number having been in the textile-fabric and clothing industry, with the retail and wholesale establishments, building and construction projects and the transportation and communications industry following in the order named. More than one-quarter of the strikes (764) were in New York State, with Pennsylvania following with 352, New Jersey with 198, California with 168, Illinois with 138, Massachusetts with 123 and Ohio with 116.

In half of the strikes, the major issues involved were recognition, closed shop, discrimination or other union-organization matters, while wage increases coupled with demands for decreased hours, were the principal issues in about 17 per cent.

Court Decides Hazard of Additional Lawsuits Is No Basis for Vacating Award. Following an industrial arbitration award, which was reported in the preceding issue of the JOURNAL (Vol. 3, No. 2, p. 145), deciding in favor of the Union the following question:

> "Was the Employer's so-called 'sale' of its milk routes to employees and other individuals, as 'distributors', and the discharge of those employees who refused to purchase their routes, a violation of its labor contract with the Union?"

a motion was made to the New York Supreme Court to vacate the award on a number of grounds, including an undisclosed relationship between an arbitrator and the attorney for one of the parties, the fact that the arbitrators exceeded the scope of their authority in their award, and the fact that the award would subject one of the parties to the hazards of additional lawsuits.

In a decision by Judge Rosenman,[1] the Court held that "the fact that indirect factual results of the award are onerous or will subject the union [2] to the hazard of other lawsuits is no ground for vacating the award. Such consequences often flow from a breach of contract such as the arbitrators concluded had occurred in this case."

INDUSTRIAL ARBITRATION AWARDS

Is the management justified in making a proposed increase in the work assignment from two to four looms per worker, or is such an assignment excessive and beyond what can reasonably be expected of the workers? [3]

The agreement under which the above dispute arose continued in effect until June 30, 1939. Some two months ago a proposal by the Company to increase the work assignment of weavers of transparent velvet from two to four looms per worker was rejected by the Union. Failing to reach an agreement, the arbitration clause in the contract was invoked and the difference submitted to the Voluntary Industrial Arbitration Tribunal, to be determined by a board of three arbitrators. From the Tribunal's panel of arbitrators the parties chose Paul F. Brissenden, of the Columbia University School of Business; Herman A. Gray, of the New York University Law School, and Michael Kurz, Certified Public Accountant and member of the New York Bar.

The question submitted to the board for determination was: "Is the work assignment of 19,200 picks per hour per weaver on the operation of weaving a certain transparent velvet construction, with the allocation of four looms to a weaver, reasonable or excessive, in view of the actual performance of employees during experimental studies made by the management?" It will be seen, therefore, that the question to be decided was not one of policy, but simply a determination of the fact whether one worker might be expected to tend four looms without unreasonable or excessive effort.

[1] (See *New York Law Journal*, May 18, 1939, p. 2293.)

[2] The Court apparently referred to the employer, and not to the union.

[3] See Vol. 3, No. 2, p. 143, for report of an earlier proceeding, out of which this arbitration arose.

The Union's claim was that the proposed assignment is more than can reasonably be expected of the workers and would increase unemployment and that it is part of a nation-wide effort on the part of the industry to step up work. The management, on the other hand, upheld the reasonableness of the assignment as proved by actual tests, and claimed that competitive conditions in the trade make it necessary to increase individual production, in view of practices in other mills where the four-loom assignment is in operation, and that failure to be able to meet this competition will result in a loss of business and a shut-down of the mill.

The board of arbitrators held two hearings, the first taking place in the company's headquarters, following which the board proceeded to the weaving room and there observed, in the presence of representatives of both parties, the work of the weavers. The second hearing took place in New York City. In addition to an examination of time charts and studies, a considerable amount of oral testimony was received by the arbitrators from management, workers and union representatives.

Upon completion of the hearings, the arbitrators arrived at a unanimous decision to the effect that the work assignment of 19,200 picks per hour per weaver on the operation in question, with the allocation of four looms to a weaver, is reasonable and does not require excessive effort on the part of the workers.

Was the action of certain members of Longshoremen's and Warehousemen's Union in refusing to load scrap iron for shipment to Japan, in the presence of a picket line of Chinese sympathizers, a violation of the labor agreement between the Union and the Employers' Association?

The JOURNAL has received from Irving Stalmaster, Permanent Arbitrator under the agreement between the Waterfront Employers' Association of the Pacific Coast and the International Longshoremen's and Warehousemen's Union, Local 1-13, a copy of his award in the above question, of which the following is a summary.

On May 5, 1939, the Japanese S. S. "Meiu Maru" was docked at Terminal Island, San Pedro, California, to receive scrap iron for shipment to Japan, and five gangs of longshoremen were dispatched from the hiring hall to handle the job, reporting for work

that morning. Between 12 and 1 o'clock, while four of the gangs were at lunch, a group of men, women and children appeared at the dock and began a peaceful demonstration against the loading of the scrap iron and urging a boycott of Japan. There were no threats or indications of possible violence to the workers. Because of the presence of the pickets, however, the four gangs of workers refused to continue to work the ship and shortly thereafter left the dock.

This action on the part of members of the Union, the Employers claimed, was in violation of Section 11(b) of the agreement, which provides that "in case a dispute arises, work shall be continued pending the settlement of same in accordance with the provisions of the Agreement and under the conditions that prevailed prior to the time the dispute arose."

In his award the Arbitrator determined that the demonstration "was not a 'picket line' made up of members of a labor organization and in no sense of the word was there a 'labor dispute' in progress in consequence of which a legitimate picket line was formed." He further found that, in failing to load the cargo under the conditions prevailing, the four gangs of men in question "violated the provisions, spirit and intent" of the contract between the parties.

In his award, the Arbitrator called attention to a statement of the President of the Union, made at the time the present contract was submitted to the members for ratification, in which he said:

> "Stoppages of work that violate the agreement over minor matters in many cases, jeopardize the welfare of our entire organization and the majority of its members, and in many cases are definitely anti-union activities."

As to this statement, the Arbitrator stated in his award:

> "Any man who, singly or in concert with a few others, takes it upon himself to disregard or violate the provisions of the agreement, or without cause interferes with the realization of its benefits intended for all, does the cause of unionism a great injustice and becomes its enemy as surely as the employer who would violate that self-same agreement."

INTERNATIONAL AND FOREIGN ARBITRATION*

Advisory Committee: *Philip C. Jessup, Chairman; Sophonisba Breckinridge, Herman G. Brock, Raymond L. Buell, John W. Davis, Stephen Duggan, Allen W. Dulles, Frederick S. Dunn, James A. Farrell, James W. Gerard, Frank P. Graham, Lloyd C. Griscom, Boies C. Hart, Alvin S. Johnson, Jackson H. Ralston, James T. Shotwell, Thomas J. Watson.*

ARBITRATION BY THE COUNCILS OF THE BAR IN POLAND

BY

ROMAN KURATOW-KURATOWSKI AND JANINA WOJTECKA †

CIVIL and commercial arbitration has made considerable progress in Poland, due chiefly to the support given to it by the Polish Code of Civil Procedure of 1932, which unifies arbitration law for the entire country.

In addition to general regulations of civil procedure relating to arbitration, certain laws comprise specific regulations which further the settling of disputes by arbitration. In the Act concerning the Organization of the Bar of May 12, 1938, there is a regulation which extends the activities of the Councils of the Bar to include arbitration between advocates, between advocates and probationers (*avocat-stagiaire*), as well as between advocates and their clients. (An identical regulation was included in the previous Act of October 7, 1932).

It should be observed that the internal autonomy of the Polish Bar is extensive; it is divided into advocates' chambers, which are conterminous in their respective jurisdictions with the districts of the Courts of Appeal. The highest authority of the self-management of the Polish Bar and its representative is the Chief Council of the Bar, domiciled in Warsaw.

* This section is concerned primarily with the economic aspects of international peace and the functioning of international economic peace machinery and with its coordination with activities within States, as presented in the American Commercial and Industrial Sections, and the corresponding activities in other nations as set forth under Foreign Arbitration.

† Members of the Warsaw Bar. Dr. Kuratow-Kuratowski is Collaborator of the JOURNAL for Poland.

According to the resolution of October 5, 1934, of the Chief Council of the Bar, which provided for the organization of arbitration courts, the Councils of the Bar appoint permanent Arbitration Committees, which are composed of a President and a certain numbers of members (there are, at present, 24 in the Warsaw Chamber). For the settlement of disputes between advocates of various chambers, the Chief Council of the Bar has created a permanent Committee whose members are advocates from the larger cities.

The Arbitration Committees within the different Councils operate according to regulations established by these Councils. The following is a description of the way in which the Arbitration Committee functions in the district of the Council of the Bar in Warsaw, according to the regulations of March 2, 1937:

The purpose of the Arbitration Committee is to bring about the conciliation of disputes and to render a decision in civil disputes:

(a) Between members of the Chamber (*i. e.*, advocates and probationers);

(b) Between members of the Chamber and their clients, if these disputes concern the professional activity of the advocate.

Disputes between members of the Chamber arising out of their professional relations are arbitrated exclusively in the Council of the Bar. A motion brought by one of the parties binds the other to arbitration by the Committee. This is a general rule in force in all of the District Chambers throughout Poland.

Different regulations, however, apply to disputes between advocates and their clients. While a client cannot be forced to submit a dispute to the Arbitration Committee, the advocate may not refuse to arbitrate if his client demands that the dispute be submitted to the Arbitration Committee, so long as the controversy concerns the advocate's professional services. In exceptional cases, however, the Council of the Bar may release the advocate from the obligation to arbitrate if, for example, the claim presented by the client is obviously unfounded.

In actual practice, disputes between advocates and clients constitute the majority of cases submitted to the Committee and chiefly concern disputes relating to fees.

The obligation of the advocate to submit to arbitration by the Council of the Bar is not based on any specific legal regulation, nor do the general laws provide for any sanctions for the non-

performance of this duty. The Chief Council of the Bar, however, for reasons of prestige and ethics, requires that disputes between advocates arising in connection with their professional activities be submitted to the Council of the Bar, instead of to the State Courts and for the same reason requires the advocate to arbitrate a dispute with a client, if the latter of his own accord wishes to submit to arbitration by the Council of the Bar. No lawyer, to the writers' knowledge, has ever refused to arbitrate under these circumstances. Should he do so, he would have to face disciplinary action by the Councils of the Bar and might even be disbarred.

The proceeding before the Arbitration Committee has two stages. In the first stage a member of the Committee, delegated *ad hoc* by the President, attempts a conciliation between the parties. In the event of failure, the parties are invited to submit the dispute to the Arbitration Court, which then proceeds with the case. In the course of the proceedings a further attempt at conciliation may be made by the Court.

The members of the Arbitration Tribunal are not appointed by the parties, but by the President of the Committee from among its members. The Committee member, however, who attempted conciliation may not serve in the Arbitration Tribunal. The Tribunals are permanent groups of three persons not subject to change, sitting periodically and presided over by each member in turn. In minor disputes, the Tribunal may have only one member, if the parties so agree.

In the proceedings before an Arbitration Tribunal, which are conducted without charge to the parties, the regulations of the Code of Civil Procedure on Arbitration Courts are applicable. The awards of the Tribunal are final and not subject to appeal. The original award of the Arbitration Tribunal is deposited with the State Court, together with other documents, and may be executed in the same manner as judgments of the State Court. A general supervision is exercised by the Council of the Bar over the activities of the Committee in connection with arbitrations, the execution of awards and the arrangements of the proceedings.

Arbitral jurisdiction in the Council of the Bar is progressing satisfactorily and comprises a steadily increasing range of cases. By means of arbitration within the above limits, the Bar avoids the bringing of disputes involving the professional conduct of

its members before the State Courts. Likewise, the majority of disputes relating to advocates' fees are disposed of by arbitration. It is obvious that such a practice serves to enhance the prestige and authority of the Bar in Poland.

WORLD TRADE CENTER *

BY

FRANCES KELLOR †

FROM the trade caravans of Marco Polo's day and the fairs of the itinerant merchants and traders—the fairs of the "Dusty Feet"—which were the earliest method of trading in England, down to the World of Tomorrow now being presented at the New York World's Fair, is a span of many centuries. In this long history of local and world's fairs, set up that men might advertise and see and buy and sell their commodities or services, the New York World's Fair is the first to have a World Trade Center established in the midst of its exhibitors and open to its many visitors.

The theme of the New York World's Fair Trade Center is that of the world of tomorrow. The slogan *"World Peace through World Trade"* has been proclaimed to the world by the International Chamber of Commerce, and it has now come to rest, for practical organization and application, at the World Trade Center. For it is here that the educational work concerning foreign trade and its possibilities for maintaining world peace will be carried on, and where arbitration as a substitute for force in the settlement of controversies will be an essential part of such education.

The idea originated with the National Foreign Trade Council, and contemplated a central focusing point for participating exhibitors. Since many of these had such complete exhibits of their own, a somewhat different and more educational plan, embracing a hospitality center, has been substituted for the original scheme.

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† First Vice President, American Arbitration Association.

The present World Trade Center was founded by Thomas J. Watson, President of the International Chamber of Commerce,[1] to whom the space of 5,000 square feet, constituting a separate pavilion, was granted by the Fair authorities for the use of the Chamber. Associated with him as co-chairmen are James A. Farrell, Chairman of the National Foreign Trade Council and dean of foreign trade in the United States, and John L. Merrill, President of the Pan American Society in New York and long a leader in Pan American affairs.

Mr. Watson, who is also Chairman of the Inter-American Commercial Arbitration Commission and a director of the American Arbitration Association, entrusted to these two organizations the preliminary organization of the World Trade Center and the assembling of its different units, which are unique in the diversified support they bring to the advancement of the knowledge of world trade and to the development of goodwill and confidence so essential to its growth.

For this purpose, a tentative World Trade Center general committee and executive committee were organized to administer the Center, under the leadership of the three co-chairmen, and the Chairman of the Executive Committee, Edgar W. Smith.

No more perfect setting for a World Trade Center could have been found. It is located on the Court of Peace, two pavilions away from the stately Federal Building which presides over the Court. Flanking each side of the Court and terminating at the beautiful fountains are the magnificent buildings in which each nation expresses its own cultural and industrial genius. Behind these buildings are many of the American exhibits which give an American industrial background to the whole setting.

These great industrial and cultural units of civilization grouped about the Court of Peace, each presenting separately the story of its own nation, had no natural common meeting ground open to all of them on terms of friendship and equality. There was no central place where meetings could be held, views exchanged, where information was available or where new understandings and friendship might be created. There was no place where the common interests of foreign trade could be drawn together. In the Pan American Union Building such a unity

[1] Mr. Watson retired from the Presidency of the International Chamber of Commerce at the Chamber's 10th Congress at Copenhagen, June 26-July 1, after this article was written. [Ed.]

exists for the Americas, and it is to supplement its work and coordinate it with the great world of commerce that such a center was needed.

To this opportunity, created by the presence of so many foreign exhibitors on the Court of Peace and foreign visitors, the World's Fair has given practical reality by contributing the pavilion formerly allotted to the Chinese government and by helping to finance its interior construction and decoration, thus enabling the World Trade Center Committee to bring the Center within the budget it had raised. To the cooperation of Mr. Watson, who made the space possible; to the President of the World's Fair, Grover A. Whalen; to Julius C. Holmes, Administrative Assistant, and to Edward F. Roosevelt, Director of Foreign Government Participation, the Center owes its real existence.

Under the new plan of bringing to the World Trade Center broader interests and resources for the advancement of world trade, several organizations were invited to collaborate in the maintenance of the Center, in working out individual programs and in joining in general activities. That pioneer in world trade, the National Foreign Trade Council, under the valiant leadership of Mr. Farrell, leads the list. Next comes the International Chamber of Commerce, bringing to the Center the vast experience and resources of the Chamber, in which all nations are represented. Side by side with the Chamber ranks the Bureau of Foreign and Domestic Commerce of the U. S. Department of Commerce, which carries the banner of leadership in the United States and abroad. Then come the practical peacemakers, the arbitration groups: the American Arbitration Association and the Inter-American Commercial Arbitration Commission, which are binding the nations together in pacts of peace guaranteed by arbitration in place of force and war.

Newcomers in this field of foreign trade relations are the youth of the country, the business men of tomorrow. The American and International College Center, which is the organization bringing to the cause of world peace through world trade the energy of the youth of the country, is headed by such men as Dr. John H. Finley, Mortimer N. Buckner, Dr. Nicholas Murray Butler, Dr. Harold G. Campbell, Chancellor Harry Woodburn Chase, Gano Dunn, The Very Rev. Robert I. Gannon, Thomas W. Lamont, Dr. Nelson P. Mead, Dr. Frederic B. Pratt and Lawrence Rockefeller, and Mrs. James Rowland Angell.

Strengthening the whole structure is the National Peace Conference, veteran of many campaigns for better understanding and goodwill.

The World Trade Center was dedicated on May 21st by the Hon. Francis B. Sayre, Assistant Secretary of State, and is now open to visitors at the Fair and especially to all foreign and domestic exhibitors.

Although it is too early to indicate what its programs will be, the purposes of the Center are well defined. They are to promote an interest in foreign trade through education; to provide a common meeting place for those interested in advancing foreign trade and peace through channels of trade and to provide information. But most of all the Center and the Court of Peace, which it faces, constitute a neighborhood center for the nations of the world where old relationships may be strengthened, where new friendships may be made, where friends may meet in the leisure of the evening and watch the special illuminations and hear the music and where goodwill may be extended and confidence established.

The World Trade Center is an experiment in democratizing and expanding world trade through goodwill. Its participating organizations give to it a high measure of confidence. It is a friendship center, free from nationalist aims, private interests or propaganda. As its functions expand simply and naturally, free from pressure or forced programs and formalities, through the community of nations that occupy the Court of Peace and its environs, the Center will serve the needs not only of world trade, but of world peace, which has at last come to rest upon this economic foundation.

In the words of Secretary of State Cordell Hull, in his message to the World Trade Dinner on May 25, 1939, its broad purpose is best expressed as follows:

> "The panorama of constructive development portrayed on an international scale as part of the New York World's Fair, the site of your meeting, serves to focus attention on the continuous and amazing progress of mankind in the realm of applied science and art. Such progress has been possible because science and culture are universal forces which in the long run surmount international barriers.
>
> "In contrast to this impressive portrayal of the world's scientific and cultured advancement is the dark spectre of disunity and strife with which humanity is today confronted.

"If further economic decline throughout the world is to be averted, there must be a halting of the growth of both military and economic armaments and a restoration of confidence and goodwill among nations.

"Foreign trade has become more than an economic process. It has become the symbol of a free and peaceful world. It stands for a method of international life which serves the orderly processes of humanity. Properly developed, it is more effective than empire.

"War yields a negative result, trade a positive result. Dimly the world knows this and is today struggling to determine whether it can reach its goal by commerce instead of by conflict".

THE LAW OF ARBITRATION IN SOUTHERN RHODESIA—ITS HISTORY AND DEVELOPMENT

BY

H. M. BARBOUR *

THE Southern Rhodesia Order-in-Council, 1898, enacted that the law of Southern Rhodesia "shall, insofar as not inapplicable, be the same as the law in force in the Colony of the Cape of Good Hope on the tenth day of June, 1891." By virtue of this provision the Lands and Arbitrations Clauses Act, No. 6 of 1882, of the Colony of the Cape of Good Hope was made applicable to Southern Rhodesia.

This Act consolidated all the provisions contained in previous statutes of the Colony of the Cape of Good Hope, which authorized the taking of lands and materials for public and other works and which made compulsory the settling of compensation by arbitration.

The Act contemplates that, unless another mode of reference is provided, the reference shall be to two arbitrators, one to be appointed by each interested party. It is only where both parties concur in the appointment of an arbitrator that reference is to be made to a single arbitrator.

The Act prescribes the rules which are to govern arbitration proceedings under it, and makes provision for other rules which are to govern the proceedings where an interested party is a minor or a person under curatorship.

This statute remained the sole measure regulating arbitrations until 1928, when the Legislature of Southern Rhodesia saw fit to pass the Arbitration Act, No. 8 of 1928. One of the main objects Parliament had in passing this latter Act was to sup-

* Collaborator of the JOURNAL for Southern Rhodesia.

plement the provisions of the Act of 1882 where they appeared to be incomplete and out of date. Passage of time had proved that the Act of 1882 was lacking in a number of provisions which experience had shown to be necessary in a general measure dealing with arbitration.

The Arbitration Act, 1928, is applicable only to arbitrations pursuant to a submission, which is defined in the Act as "a written agreement, wherever made, to submit present or future differences to arbitration, whether an arbitrator is named therein or not". Arbitration in turn is defined as "any proceedings held pursuant to a submission". To this extent the Act of 1928 provides for circumstances which are not specifically dealt with in that of 1882.

The Act is, for easy reference, divided into divisions as follows:

(1) Reference by consent out of court.
(2) Reference under order of court.
(3) General.

The first division deals with those references where the parties have entered into an agreement in which they agree, in cases of dispute, to go to arbitration, or, where a dispute has arisen, the parties agree to submit that dispute to arbitration. The division makes detailed provision for the procedure to be followed in carrying on the arbitration proceedings in these cases.

The second division enables the High Court of Southern Rhodesia to refer special matters, best dealt with by a referee or arbitrator, to such referee or arbitrator for examination and decision on the point submitted to him. The recognition of this right of the High Court dispelled the suspicion which was apparent at the time, in common, presumably, with the suspicion which existed in other countries until they had recognized a similar right, that the courts of law were apt to regard arbitration not only with jealousy but with aversion.

The third division is a general one and deals mainly with procedure, but it does provide for two matters of importance which merit particular mention.

In the first place, it gives the High Court wide powers of issuing the process of the Court to compel the attendance before a special or official referee, or before an arbitrator or umpire, of a witness, wherever he may be within the Colony, and of ordering any prisoner to be brought up for examination before such referee, arbitrator or umpire.

In the second place, it contains a very useful provision under which referees, arbitrators or umpires may, at any stage of the arbitration proceedings, refer a special case to the High Court on a question of law. The value of this provision is obvious. It very often happens, as experience has frequently shown, that although arbitrators are competent enough to deal with matters in the ordinary way, they have no experience in legal matters and are not competent to decide a purely legal question. In all cases where it is necessary to decide a legal question it is highly desirable that arbitrators should have the power to refer such question for legal decision.

The Schedule to the Act contains various rules of procedure. These rules, so far as they are applicable to the reference under the submission, are deemed to be included in the submission unless a contrary intention is expressed therein. In terms of these rules it is prescribed that the mode of reference shall be to a single arbitrator unless the parties decide otherwise.

Parliament intended that, in the passing of the Arbitration Act of 1928, the Lands and Arbitrations Clauses Act of 1882 should be retained only for the specific kind of arbitration for which it provides, that is to say, arbitration when land or materials are being expropriated, and that, apart from this, the Arbitration Act of 1928 should apply to all other arbitrations. There were, however, a number of statutes in force in 1928 which provided for matters in dispute being referred to arbitration, and these statutes invariably had provided that the arbitration was to be governed by the Lands and Arbitrations Clauses Act, 1882. To overcome this difficulty and to provide for the Arbitration Act of 1928 taking the place of the Act of 1882 in these statutes, Parliament included in the 1928 Arbitration Act the following provision:

> "Whenever in any law in force in the Colony of Southern Rhodesia, other than the Lands and Arbitrations Clauses Act, 1882, reference is made to the said Lands and Arbitrations Clauses Act, 1882, reference shall be had to this Act from and after the date of its promulgation."

When Parliament passed this section, however, it entirely overlooked the fact that the approaches to arbitration resulting from prior agreement or, strictly, submission and to arbitration which is made compulsory by statute are quite different, and that, consequently, the machinery of the Act of 1928 could not be used in cases of compulsory arbitration.

This position was soon realized, but it was not until 1938 that the matter was rectified. In that year the General Law Amendment Act, No. 37 of 1938, was passed. Amongst its provisions the following section was included:

> "Section 1 of the Arbitration Act, 1928, is hereby repealed, and whenever in any law reference is made to the Lands and Arbitrations Clauses Act, 1882, or to the Arbitration Act, 1928, reference shall be had to the Lands and Arbitrations Clauses Act, 1882."

This provision in effect reverses the 1928 decision and enacts that the Lands and Arbitrations Clauses Act, 1882, shall apply to all arbitrations, no matter what the subject-matter, which are made compulsory by statute, and that the 1928 Arbitration Act shall apply only to those arbitrations which are pursuant to a submission as defined in the Act. This is the position as it exists to-day.

Up to the present, arbitration has not been used to any great extent in Southern Rhodesia. This is due perhaps to the fact that commercially and industrially the country is still comparatively small and the opportunities thus limited. There is, however, an ever-growing tendency to use it more. Parliament has given a lead in this direction. In a number of recent statutes provision has been made for the settlement by arbitration of any matters of dispute which may arise as a result of the administration of any of those statutes.

INDUSTRIAL NOTES

New Zealand Federation of Labor Urges Reorganization of Arbitration Court. Drastic reorganization of the Arbitration Court system of New Zealand, by which it would be "shorn of the wig and gown formalities and be a purely industrial court", was suggested in the annual report of the chief executive of the Federation of Labor, submitted to the annual conference of affiliations, which took place in Wellington in April.

"While the present machinery of the Court has been of value to many organizations," the report stated, "we propose to institute amendments to the consolidating bill giving unions the right to enter into agreements which can be enforced without resort to the Court of Arbitration. We believe the present functions of the Court should be divided into workers' compensation and in-

dustrial sections, with a separate tribunal for each, a judge to be president of the first and a layman president of the other.

"We believe unions should be given the option of meeting employers directly and attempting to negotiate an agreement covering wages and conditions, and that the agreement should be given the same standing as an award of the Court."

A different viewpoint is expressed editorially by the *New Zealand Herald,* in its issue of April 8, 1939, concerning the suggestion for separate tribunals to deal with compensation claims and industrial disputes. There the opinion is expressed that "the Court of Arbitration exists to deal dispassionately with industrial disputes between workers and employers, both of whom have permanent representation on the Court. Difficulties arise when these representatives disagree, and the presence of an impartial president, trained in the determination of fact, is an essential to the working of the system. The judicial functions of the Court are extremely important. Its judgments should have a binding force on both parties, and they must be prepared so that they represent the considered opinion of the Court and are not capable of varying interpretations. A layman as president of the Court, no matter how broad his outlook and impartial his judgment, would lack an essential degree of technical knowledge, and the status of the Court would suffer as a result."

Labor Decree of Spanish Government. *The New York Herald-Tribune* of May 1, 1939, reported the issuance by the Spanish Government on April 30 of a decree establishing vertical syndicalism in Spain in place of professional syndicalism, and prohibiting strikes. Under the "vertical" plan, trade union boards will be created to govern each industry separately and will have jurisdiction over all executives, administrative officials and workers, who will be placed on the same plane, rather than in different categories, as under the "horizontal" system.

The decree also authorizes a government intervener to arbitrate all collective and individual labor disputes and to prevent dissension.

Bombay's First "Stay-in" Strike. In April of this year, Bombay experienced its first "stay-in" strike and the first arbitration in the Bombay textile industry, which followed a minor dispute in a cotton mill. Due to business depression, the mill decided to

close its plant on April 15 and posted notices to its employees to that effect. Four days before the scheduled closing, the workers in several of the departments of the mill put down their tools and staged the stay-in strike. Upon the intervention of the Home Minister, the strike was referred to Mr. Justice Divatia as arbitrator, and within 24 hours the workers left the mill. The decision of the arbitrator held the workers to be in the wrong and that, by their action, they had forfeited their right to four days' wages, from April 11 to April 15.

In making public the arbitrator's findings, the Government took the occasion to define its attitude on this type of strike, which it declared to be both a criminal offense and a civil wrong, and urged workers not to be parties to such an action in the future.

A full report of the dispute and of the arbitrator's award is contained in the *Indian Textile Journal,* for May 1939 (p. 323).

Peaceful Change in Engineering Industry. The London *Engineer,* commenting in its issue of May 19, 1939, on the announcement made a few days earlier that engineering employers had agreed to increase by two shillings a week the national bonus paid to all adult male workers, thus ending amicable negotiations which had been in progress for many months, during which time there was "no hint of a strike, no signs of ill will, no exhibition of class antagonism", makes the following statement in contrasting this episode and its counterparts in years gone by:

> "Years ago the question would have been fought out with bitterness on both sides and pathetic distress on one. The newspapers would have been full of it; it would have echoed in Parliament. Now the change, like many that have preceded, has been effected so quietly that relatively few people knew that anything was going on till they read in the train on Wednesday of last week that it had been settled. Whilst it is inevitable that cases provoking stronger feelings than this will arise, we are convinced that if hotheads can be effectively controlled and if political differences can be excluded, then all industrial sociological problems of whatever kind between employers and employed can be solved by a peaceful arbitration."

Industrial Relations in The Netherlands.[1] Voluntary cooperation between employers and employees is the keystone of industrial relations in The Netherlands. Although the Government

[1] Summarized from a report by J. P. Moffitt, American Consul at Amsterdam, in *Monthly Labor Review,* Vol. 47, No. 2, p. 313.

provides machinery to aid in the settlement of industrial disputes, in the majority of cases the differences are adjusted by employers and employees making use of the special bodies established by collective agreements. This supplemental machinery is provided by the Government under the Labor Disputes Act of May 4, 1923, and includes conciliation, arbitration and a special-inquiry procedure for very important cases.

A large proportion of the collective agreements governing working conditions contain provisions for settling industrial disputes arising in connection with their application. The details of the system adopted vary, but generally the contracts provide that both parties will refrain from any action that may lead to strikes or lockouts during the life of the agreement. Settlement of disputes by arbitration is usually provided for, either by arbitral committees appointed for the duration of the agreement or by committees established to settle a single dispute. Regardless of whether the committees are permanent or temporary, it is customary for them to have a membership consisting of equal numbers of employer and employee representatives and an impartial chairman.

Briefly, the governmental machinery to which recourse may be had where no machinery is provided by the collective agreement or when the system provided fails to bring about a settlement, is as follows:

(1) *Conciliation.* A permanent staff of Government conciliators is maintained by the Ministry of Labor to function in every district of The Netherlands and in certain industries. In certain types of disputes the conciliator is named by the Minister of Labor, in others he may intervene on his own initiative or on the demand of the parties when a dispute has resulted in or threatens a stoppage of work and other means of settlement have failed. Conciliators have the right to subpœna interested parties, who must appear in person or be represented. Within the conciliator's discretion, he may recommend a conciliation board or a special conciliator or a special inquiry, or he may assist in bringing the dispute to arbitration. No power exists for the enforcement of the conciliator's opinion, although, if the proffered settlement is refused, the findings may be published, thus influencing public opinion.

(2) *Arbitration.* Arbitration proceedings may be instituted directly or after conciliation has been attempted. The Govern-

ment conciliator may not act in the capacity of an arbitrator, but his cooperation is required throughout arbitral proceedings, except in cases outside his competence or that are not sufficiently important to justify arbitration, or if the number of persons petitioning does not represent a sufficient proportion of those affected, or if previous conciliation proceedings have been successful. If the case proceeds to arbitration, the parties sign a submission agreement containing the necessary particulars, nominating the board of arbitrators and the chairman and including a statement as to the duration and validity of the award, which must be by a majority vote. Witnesses may be examined under oath and the submission of books and other documents required. Minutes of the proceedings must be kept in every case and are forwarded to the Government conciliator, together with the award, within three days after the close of the proceeding. The Minister of Labor may, in his discretion, cancel an award and order another, or may require revision of an award. An award, once accepted, has the same force as a collective agreement.

Arbitrators and Government conciliators are bound, under pain of imprisonment or fine, to keep all matters secret which become known to them through the exercise of their arbitral functions.

(3) *Special Inquiry.* If a dispute seriously affecting public interests is likely to cause or has caused a strike or lockout affecting not less than 300 workers, the Minister of Labor may appoint a committee to inquire into the dispute, nominating its chairman and secretary and laying down rules of procedure he considers necessary. The committee has the same powers to summon witnesses and require the submission of documents as have arbitrators and conciliators. Decisions are based on study of the circumstances of the dispute and the extent to which demands of either party may be granted, and reports are submitted to the Minister. While the conclusions are published, a report on the case may not be given out without agreement of the parties concerned or their respective organizations.

COMMERCIAL NOTES

Arbitration Tribunal Proposed to Aid British Government in Ship Purchases. An arbitration tribunal to determine the value of ships purchased by the British Board of Trade, when the

Board and the shipowners are unable to agree upon the price, is contemplated by a Bill now in preparation in the House of Commons, the purpose of which is to prevent the loss of tonnage which would follow if older ships were removed from the registry as fast as new ships now under construction are added, and thus to provide a shipping reserve of merchant ships against a national emergency.

A Supplementary Estimate of £2,100,000 was moved in the House of Commons on May 17, which would make it possible, upon passage, for the Board of Trade to start negotiations for the purchase and upkeep of suitable ships as a part of this reserve; and a Bill now in preparation would place a legal obligation upon shipowners to offer their ships to the Board of Trade before offering them for sale abroad or otherwise in Great Britain.

According to an announcement in the *Liverpool Journal of Commerce* of May 18, 1939, "an attempt would be made to reach an agreement with shipowners as to price but failing agreement there would be a tribunal, to whom the matter would be referred for arbitration".

Costs in Arbitrations under the Acquisition of Land Act. An item in *Estates Gazette* (London) of June 3, 1939, concerning arbitration proceedings under the Acquisition of Land (Assessment of Compensation) Act, 1919, is of interest as it relates to the awarding of costs under certain conditions in such proceedings.

The Act provides that where the acquiring authority has made an offer to the claimant, which offer must be unconditional and in writing, its amount will affect the question of costs, for if the sum awarded by an official arbitrator to the claimant does not exceed the sum offered, the arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made.

If the claimant has made an unconditional offer to accept a certain sum as compensation and has complied with the provisions of the Act, and the sum awarded is equal to or exceeds that sum, the arbitrator shall, unless for special reasons he thinks proper not to do so, order the acquiring authority to bear their own costs and to pay the costs of the claimant, so far as such costs were incurred after the offer was made.

Under Section 5, Sub-section (8) of the Act, costs include "any fees, charges and expenses of the arbitration or award".

Dairy Farmers in England Win Important Award. Sir Stephen Demetriadi, President of the London Chamber of Commerce and arbitrator in the recent dispute between the Milk Marketing Board (representing the producers) and the Central Milk Distributive Committee (for the manufacturers) as to the prices to be paid the producers for milk used in manufacturing products such as milk powder, condensed milk, butter, etc., announced his decision in the latter part of April, in which he refused the application of the manufacturers for a reduction in prices paid for liquid and skim milk.

The decision is of great importance to dairy farmers, for not only would an adverse award have meant an estimated loss of £500,000 before the end of the year, but it also brings to the fore the question of Government protection of the home industry against foreign competition. The manufacturers' claim that their selling prices had collapsed owing to an excess of cheap imports into the country, following the break-down of the voluntary agreements covering imported supplies, was met by the position of the producers that the permanent solution of the manufacturing problem was in the hands of the Government, to be dealt with by effective regulation of imports.

Arbitration in Trinidad and Tobago.[1] Ordinance No. 5 of April 26, 1939, amends and consolidates the law relating to arbitrations. The previous law was an ordinance of 1898 based on the English Arbitration Act of 1889. Several important amendments were made in the English law by the Arbitration Act of 1934, and the Consolidated Ordinance incorporates these amendments, as well as those dealt with by the English Judicature (Consolidation) Act, 1925.

The principal amendments relate to the effect of the death or bankruptcy of a party to the arbitration agreement and to the appointment of an umpire. An award will carry interest at the same rate as a judgment debt, and an agreement that the parties shall in any event pay their own costs will be void. It is also expressly declared that the statutes of limitation shall apply to arbitrations, and a charging order for solicitors' costs in arbitrations can be obtained. Amendments are also made to the powers of arbitrators and of the court, and the statement of a special case.

[1] From *Commerce Reports*, June 10, 1939, No. 23, issued by the Bureau of Foreign and Domestic Commerce of the U. S. Dept. of Commerce.

Certain provisions of the ordinance are excluded in the case of statutory arbitrations, and arbitrators are given power to order specific performance.

British Architects' Standard Form of Contract (1939) Becomes Effective. The revision of the 1931 form of contract of the Royal Institute of British Architects has been completed by the Contracts Tribunal and, following its approval by the Practice Committee, the Executive Committee and the Council of the National Federation of Building Trades Employers, became effective on July 1, 1939, at which time the existing form of contract was withdrawn from circulation.

No alterations have been made in the revised form affecting the underlying principles and agreements of the 1931 form, those which have been made being restricted to the removal of ambiguities and conditions in disagreement with modern practice in the industry. Under Clause 26, relating to arbitration, there is now no alternative arbitration clause, and this clause provides for referring every dispute to arbitration. The clause has been extended so as to remove any doubt as to whether some matters could be referred.

Arbitration in Moscow. *The Shipping World,* London, of May 24, 1939, is authority for the statement that in issuing a revised "Russwood" charter for the White Sea timber trade, the Soviet trade authorities are once again attempting to secure acquiescence in a clause providing for arbitration in Moscow upon any disputes arising out of the charter. As reported in the same publication at the time, the Soviet made an attempt in 1935 to secure incorporation of such a clause in all Russian charters, which all owners, except a few Greeks, successfully resisted. This new attempt has impelled the Protection and Indemnity Associations to draw owners' attention to it and strongly to urge refusal to accept this imposition. On the former occasion the Associations pointed out the difficulty of obtaining proper protection for owners' interests in the event of an arbitration being held in Moscow.

Commercial Arbitration in Greece.[1] Commercial arbitration was introduced in Greece shortly after the country gained its inde-

[1] Extract from an article by K. L. Rankin, Commercial Attache, Athens, in *Comparative Law Series,* April 1939 (Vol. II, No. 4).

pendence. Fourteen articles (51 to 64) of the Greek Commercial Code of 1835 were devoted to arbitration in disputes between partners. Such arbitration was obligatory in the case of certain disputes arising from partnership relations. In case one of the partners did not agree to the appointment of arbiters, these were appointed *ipso jure* by the court. Greek civil procedure also recognized the principle of arbitration as a means of settlement of all kinds of disputes (arts. 105-126). In the case of commercial disputes or those relating to bills of exchange, arbitration was obligatory upon the defendant if demanded by the plaintiff at the time of instituting proceedings. Article 124 of the Code of Civil Procedure introduced the appointment of unofficial "adjusters" in addition to arbiters. The former were selected by the litigants and, in addition to securing a satisfactory compromise, they countersigned the report of adjustment, which was declared enforceable by the presiding magistrate of the Court of First Instance.

Little use was made of arbitration as a means of settling commercial disputes while the commercial courts operated in Greece. These courts were established by law in 1835 and were abolished by Law 1457 of 1887. Even after that date, however, the methods of compulsory arbitration and adjustment were seldom employed. Compulsory arbitration between partners was abolished by subsequent provisions of civil procedure, which introduced so many protective and restrictive clauses and formalities in the machinery of commercial arbitration that not only were considerable delays encountered, but the decision of the arbiters could easily be reversed by certain magistrates.

A new and more satisfactory treatment for commercial disputes was inaugurated by the Chambers of Commerce Law 184 of 1914. Articles 40 to 53 are devoted to arbitration in commercial disputes, which is subject to the jurisdiction of chambers of commerce.

Commercial arbitration, as introduced by Law 184 of 1914, is administered by chambers of commerce in commercial disputes even if the parties are not members of a chamber and are not qualified as merchants. Commercial arbitration is optional in principle, but it becomes obligatory when one party declares in writing to the president of a chamber of commerce his willingness to accept arbitration as a means of settling a commercial dispute. The procedure of arbitration becomes simpler in case

the declaration is signed by both litigants. If one party fails or refuses to appoint his arbiter, the president of the chamber makes the appointment in his behalf and the case may be heard and adjudicated by default. The office of arbiter is obligatory under law, the person appointed having no right to refuse his appointment except for well-established reasons. Only qualified persons included in a list drawn up by each chamber of commerce may be appointed as arbitrators. The arbiters judge on the basis of commercial customs, the provisions of commercial and civil law being used only in an auxiliary manner. The procedure to be followed by the arbitrators is not prescribed by law, but is provided for in the arbitration regulations of each chamber of commerce. An arbitration proceeding may be stopped only by common consent of the two parties, which is communicated to the president of the chamber. Otherwise the only recourse is a formal appeal to the Court of Appeals.

The new principles, established by Law 184 of 1914, differ widely from those provided in the earlier commercial law and civil procedure, the intention being to popularize the use of arbitration in commercial disputes. Law 184 modifies the obligatory feature in arbitration between partners and disputes of a commercial nature or those involving bills of exchange, and endeavors to establish methods to which parties in dispute will resort voluntarily. Furthermore, it simplifies procedure, largely eliminates delays, leaves greater liberty to the arbiters, and reduces costs.

INTERNATIONAL NOTES

Announcement of Canadian-American Arbitration Tribunal. Formal announcement of the establishment of a Canadian-American Commercial Arbitration Commission was made on July 3, 1939, by the Canadian Chamber of Commerce and the American Arbitration Association. When details for the establishment of the joint collaborative plan are completed, there will be a uniform commercial arbitration system covering the entire Western Hemisphere, which will make it possible for commercial controversies between Canadian and American or Latin-American business men to be settled by arbitration in place of litigation.

The Canadian-American Arbitration Tribunal will be organized and administered by a joint Commission composed of

ten prominent business men, each organization naming five members of the Commission.

The members of the Commission named by the Canadian Chamber of Commerce are: J. S. McLean (Toronto), President, Canada Packers, Ltd.; R. C. Berkinshaw (Toronto), General Manager, Goodyear Tire and Rubber Co. of Canada, Ltd.; A. O. Dawson (Montreal), President, Canadian Cottons, Ltd.; Henry W. Morgan (Montreal), Vice-President, Henry Morgan & Company, Ltd., and L. F. Burrows (Ottawa), Secretary, Canadian Fruit Wholesalers Association.

The members named by the American Arbitration Association are: Dr. James R. Angell, of the National Broadcasting Company; James S. Carson, Vice-President, American and Foreign Power Company; William H. Coverdale (Chairman), of Coverdale & Colpitts; Franklin E. Parker, Jr., of the law firm of Parker & Duryee and President of the American Arbitration Association, and Thomas J. Watson, President of the International Business Machines Corporation.

The new Tribunal will be coordinated with the National Tribunals of the American Arbitration Association, which function throughout the United States, and the Inter-American Commercial Arbitration Tribunals of Central and South America, which represent Latin-American interests. Canada's willingness to be represented in the uniform arbitration system brings, for the first time, all of the nations in the Western Hemisphere into a practical commercial peace organization aiming at "World Peace through World Trade".

Proposed Arbitration Plan between Manchester and the United States. The Manchester Chamber of Commerce Trade Mission, headed by E. Raymond Street and Col. W. A. Grierson, sailed from New York for England on June 7, after spending 33 days in the United States investigating the possibilities of bettering Anglo-American trade relations. Convinced that a wider use of commercial arbitration would lend confidence and stability to commercial transactions between firms in the United States on the one hand and firms in Manchester and other adjacent parts of England, on the other, the Trade Mission is transmitting a proposal from the American Arbitration Association to the Manchester Chamber of Commerce for the establishment of a plan under which each group will recommend to its members and

others engaged in such trade that all agreements contain an arbitration clause providing for the submission of any disputes to arbitration in the United States or England, as the parties elect.

Under the contemplated arrangement, when the parties agree in their arbitration clause to arbitrate in the United States, the proceeding shall be conducted in accordance with the prevailing arbitration law and under the Rules of either the American Arbitration Association, the Chamber of Commerce of the State of New York or the Cotton Textile Institute, as the parties may agree. Should they fail so to agree, the arbitration shall be under the Rules of the first named.

When the arbitration clause provides for arbitration in England, the proceeding shall be conducted under the Rules of the Manchester Chamber of Commerce.

In the event the parties have not provided for the place of the arbitration and are unable to agree as to the country in which it is to take place, the place of arbitration shall be determined by the Presidents of the two organizations.

The American organizations concerned in the proposed arbitration plan have given it their approval, and upon its acceptance by the Manchester Chamber of Commerce, the Chamber and the Arbitration Association will proceed to put it into effect.

The following arbitration clause has been approved by the collaborating organizations in the United States and, upon its approval by the Manchester Chamber of Commerce, will be distributed and recommended for use in Manchester-United States trade agreements:

> If at any time any question, dispute or difference shall arise between the parties hereto upon or in relation to or in connection with the contract or for the breach thereof, either party may give the other notice in writing of the existence of such question, dispute or difference and the same shall be referred to arbitration. The party giving such notice shall simultaneously furnish a copy to the President of the Manchester Chamber of Commerce and the President of the American Arbitration Association. When the parties agree that the arbitration is to be held in the United States it shall be held either under the rules of the American Arbitration Association, or under the Rules of the Chamber of Commerce of the State of New York, or under the rules of the General Arbitration Council of the Textile Industry, as the parties may agree. Should they fail so to agree, the arbitration shall be held under the Rules of the first named.
>
> When the parties agree that the arbitration shall be held in Great Britain it shall be held under the Rules of the Manchester Chamber of Commerce Tribunal of Arbitration.

> Should the parties fail to agree as to the country in which the arbitration should be held, the party which shall have first given notice of the existence of the question, dispute or difference shall, or the other party may, notify the President of the American Arbitration Association and the President of the Manchester Chamber of Commerce of such disagreement, furnishing copies of correspondence relating to the choice of a place of arbitration. The President of the American Arbitration Association and the President of the Manchester Chamber of Commerce shall then determine where in their opinion the arbitration should take place. They shall notify both parties of their conclusions and the arbitration shall forthwith be held in the place determined by them. If such Presidents are unable to agree they or either of them shall request the President or acting President of the International Chamber of Commerce to determine the place of arbitration and his decision shall be final.

International Chamber of Commerce. A group of 35 business leaders, headed by Thomas J. Watson, President of International Business Machines Corporation and former President of the International Chamber of Commerce, sailed from the United States on June 15, to attend the Tenth Congress of the International Chamber, held in Copenhagen June 26-July 1. In an interview given to the press just before sailing, Mr. Watson expressed the hope that the Congress of 1,800 business men, representing 52 nations, would be able to make a contribution to world peace through the medium of world trade. The general theme of the Congress was "The Need for Economic Order", and the opening session was devoted to a discussion of "The Business Man's Stake in World Peace".

A description of one of the great contributions of business men to world peace is contained in an article by Mr. André Boissier, Secretary General of the Court of Arbitration and head of the Legal Department of the International Chamber of Commerce, in the April, 1939, issue of *World Trade*. Entitled "International Commercial Arbitration—Twenty Years of Growth", the article reviews the contributions the Chamber has made to commercial arbitration and summarizes its principles and activities.

While a report of the cases submitted discloses only a part of the Chamber's contribution to international commercial arbitration, it indicates that all of the leading nations of the world have been represented by parties to cases coming to the Chamber's Court of Arbitration. Plaintiffs have been nationals of the following countries: France, Germany (including Austria), Great Britain, Belgium, Netherlands, Italy, Greece, Bulgaria, United States,

Switzerland, Spain, Czecho-Slovakia, Sweden, Mexico, Norway, Jugoslavia, Hungary, Poland, Rumania, Luxemburg, Denmark, Egypt, Iran, Siam, Argentine, Australia, Union of South Africa, Cameroons, Cyprus, Danzig, Finland, India, Indochina, Japan, Latvia, Iraq, New Caledonia, Portugal, Palestine, Panama, Rhodesia, Syria, Sudan, Turkey and Venezuela.

Defendants have been nationals of the following countries, in addition to the above: Brazil, Arabia, China, Morocco, Canary Islands, Canada, Colombia, Cuba, Costa Rica, Eire, Afghanistan, Chile, Estonia, Haiti, Lithuania, Lebanon, Nicaragua, Puerto Rico, Tunisia.

Of the 700 cases, involving a total amount in excess of 100 million francs (£570,000), that have been submitted to the International Chamber of Commerce for settlement, either by its Conciliation Commission or by the Court of Arbitration, 77 cases have been decided by arbitral award at an average cost of 1.1 per cent of the amounts in dispute; 120 have been settled before the Conciliation Commission or the arbitrator; 123 have been settled out of court after the intervention of the Chamber; in 13 cases, the Court or the Chamber has confined itself to appointing an umpire on request without further concerning itself with the dispute; 332 cases have not been proceeded with and 37 are pending.

The relatively large number of cases that have not been proceeded with is explained by the fact that in many of the disputes submitted to the Court in the first years, the parties were bound by no arbitration clause, and the Court was therefore unable to compel the defendant to accept its jurisdiction.

These cases have differed widely in their nature and have concerned nearly every type of business activity. For example:

> The transfer of licenses for the anhydration of alcohol; smelting; calculating machines; luminous advertising devices; electro-technical processes; manufacture of a rail-car, of a new kind of steel or of building piles; X-ray apparatus and electro-medical appliances; construction of water distilleries; tempering of glass.
>
> The quality or the delivery of products of all kinds, from the most perfected hydraulic machines to the various textiles, mother of pearl shells, blood albumen, figs, tobacco, paper, wine, umbrella frames, beauty products, superheater fittings, chlorate of soda, greengage pulp, boilers for destroyers, etc.
>
> The payment of commissions to commercial agents; the winding-up of accounts after liquidation; the liability of a bank after paying forged letters of credit; the distribution of commercial markets; the

question whether the import tax should be assimilated to the customs tariff from the standpoint of the charges to be borne by the parties.

Disputes following various currency devaluations, in particular that of sterling, as to which of the parties should bear the loss on exchange.

Appointments on International Commissions. Appointments by President Roosevelt to membership on International Commissions of Inquiry, announced by the Department of State of the United States since the last issue of the JOURNAL,[1] include the following:

Treaty for the Advancement of Peace between the United States and China: Dr. Hafez Afifi Pasha, former Minister of Foreign Affairs of Egypt, as the American Non-national Commissioner.

Treaty of Conciliation between the United States and Egypt: Judge Pierre Crabitès, Professor of Law at Louisiana State University, as American National Commissioner, and Judge Michael Hansson, prominent Norwegian jurist, as American Non-national Commissioner.

Treaty of Conciliation between the United States and Luxemburg: Madame Betzy Kjelsberg, member of the Labor Party of Norway, as American Non-national Commissioner.

Treaty for the Advancement of Peace between the United States and Venezuela: Mr. Constantin Argetoianu, Royal Counselor of the Rumanian Government, as Joint Commissioner.

U. S. Delegation at International Labor Conference. The delegation appointed by President Roosevelt to represent the United States at the Twenty-fifth Session of the International Labor Conference, which was convened at Geneva, Switzerland, on June 8, 1939, included the following:

Delegates for the United States Government: Charles V. McLaughlin, Assistant Secretary of Labor, and Carter Goodrich, U. S. Labor Commissioner, Geneva; Labor Delegate: Robert J. Watt, American Federation of Labor; Employer Delegate: Henry I. Harriman, Chairman of the Board, New England Power Association, Boston; Secretary: Miss Harriet Hopkinson, U. S. Department of Labor, Geneva. Included in the delegation were groups of advisers to the various delegates, also named by President Roosevelt.

[1] See Vol. 3, No. 2, p. 173.

FOREIGN ARBITRATION AWARDS

A Proceeding to Determine Whether or Not a State of War Existed Between Japan and China. An arbitration recently conducted in London, to determine the right of the owners of a vessel to cancel a charter-party, involved the question as to whether or not a state of war existed between China and Japan as of September 18, 1937.

Kawasaki Kisen Kabushiki Kaisya, of Kobe, Japan, entered into a charter-party with the Bantham Steamship Company, Ltd., owners of the S. S. "Nailsea Meadow", under which the Japanese firm chartered the English vessel. Clause 31 of the agreement provided:

> "Charterers and owners to have the liberty of cancelling this charter-party if war breaks out involving Japan."

On September 18, 1937, the owners of the vessel gave notice to the charterer that, under that clause, they were cancelling the agreement, because of the situation existing in China. The Japanese firm, the claimants in the arbitration proceeding brought before Sir Robert Aske, K. C., as Umpire, contended that the two countries were not at war on the date in question, inasmuch as there had been no declaration of war, no severance of diplomatic relations, the British Government had not recognized a state of war, the United States Government had not brought into force the Neutrality Act, and neither State had an *animus belligerendi.*

The Umpire, however, found in favor of the owners of the vessel and decided that war had broken out between China and Japan, thus entitling the owners to cancel the charter-party under Clause 31 of the agreement. Mr. Justice Goddard, in affirming the award, held that the word "war" in Clause 31 should be construed in the broad business sense and that the Umpire was justified in his conclusion that, for the purpose of construing the charter-party, war had broken out. This judgment has been appealed against.

An Arbitrator's Duty to Stay within the Contract. What are the facts which an arbitrator should take into account when deciding questions arising from an agreement, and to what extent must he confine his findings to the terms of the contract actually before him? These questions were involved in an arbitration proceeding between the Quebec Salvage and Wrecking Company

and the owners of the S. S. "Kyno", reported in *The Financial News* (Bombay), February 18, 1939.

The "Kyno" stranded near the mouth of the St. Lawrence River and arrangements to salvage her were made with the "Lord Strathcona" belonging to the Quebec Company. It was agreed that the salvaging was to be effected under the terms of a standard Lloyd's salvaging agreement—"no cure, no pay"; but, subsequently, before the work was begun, it was agreed that there should be an additional clause to the effect that if the salvaging did not succeed, the salvors were to be paid at the rate of $5,000 a day. In due course the "Kyno" was refloated and safely reached Quebec, at which time the masters of the two vessels agreed that the non-success clause should be, and it was, deleted, apparently in the belief that the salvaging having been successfully carried out, the additional and later clause was immaterial, since the sum payable in the event of successful salvage is much larger than the remuneration for an unsuccessful effort.

The Lloyd's arbitrator, to whom a later dispute as to the amount due was referred, awarded £18,000 on the basis of a "no cure, no pay" contract. The appeal arbitrator reduced this amount to £14,000, taking into consideration the deleted clause relating to non-success. For the salvors, it was argued that an arbitrator should consider only the contract before him and not go behind its terms and look at antecedent circumstances. For the owners, it was argued that there was only one contract before the arbitrator—the one entered into in Quebec with the stipulation regarding non-success, later altered by deletion of the additional clause; but this deletion was without consideration and was therefore bad, and the arbitrator was entitled to consider these facts.

His Lordship (Wrottesley J.), in allowing an appeal, said that the parties had made the alteration deliberately and with some formality and must have intended to substitute for the old agreement a new one without the added clause. The old contract, therefore, had gone, and the duty of the arbitrator was only to find out what was the proper sum to be paid for the salvage services rendered and accepted on the basis of "no cure, no pay". He had no right to consider matters which had previously been in the contract, but which had been deliberately excluded.

ARBITRATION LAW

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ARBITRATION IN INTERNATIONAL CARTEL AGREEMENTS

BY

DR. HEINRICH E. FRIEDLAENDER *

SINCE the growth of international cartels, that is, since the 80's, the signatories to such agreements have found it advisable, and necessary, to crown their efforts toward economic appeasement by providing for arbitration in cases of dispute. Cartels [1] aim at market regulation by way of price fixing, allotment of output or of territories and by joint sales organization for the sale of cartel goods. Cartels have been held valid by the courts of Belgium, Denmark, Germany, Holland, Italy and Sweden. In France, cartels have been generally recognized since about 1890, although, from time to time, a cartel is alleged to be void under two old French statutes.[2] In England, contracts and combinations in restraint of trade are void, or at least unenforceable, under the common law if they are unreasonable or against public policy. In most cases, however, cartels have been held to be valid under the rule of reason and have, moreover, found governmental regulation in numerous branches of agriculture and in some industries as, for instance, the coal industry, the textile industry and, to some extent, the iron and steel industry. In this country

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[1] The term *"cartel"* (Germany, Switzerland, Holland) is equivalent to *"entente économique"* (France), *"Consorzio"* (Italy), "Trade Association", "Federation" (Great Britain).

[2] Loi Chapelier of 1793, and Art. 419 of the Penal Code of 1810.

cartels have found partial recognition with regard to export trade under the Webb-Pommerene Act of 1918.[3]

The different laws vary greatly, not only with regard to the question of validity and enforceability of such cartels, but also as to their structure. On the one hand we find comparatively small national cartels or understandings between two or three national cartels which guarantee each other the respective home market as a "reservation", while, on the other hand, there are international organizations of a much more complicated setup which form a "League of Nations" in their own field of activity.

One can distinguish five main types of international cartels:

(1) The great protagonists-cartels, with numerous members, upon whom the light of publicity has at all times been focused. As illustrations of such cartels we mention:

> The International Steel Cartel, which represents a kind of coordinating office for three groups of suborganizations (the international selling agencies for half-finished goods, rolled wire, thin sheets, rails, etc.).
>
> The Incandescent Lamp Cartel, with the Phoebus Soc. Anonyme as central agency, at Geneva (this cartel has developed an elaborate and model system of arbitration).
>
> The Bone-Glue Cartel (Central Purchasing organization, 37 members belonging to twelve different states).
>
> The European Nitrogen Cartel (members: two national cartels and about thirty combines and firms, belonging to seven various countries, in combination with the Chilean Salpitre Cartel).

(2) Of equal importance, although not as well known, are the Two-Men and Three-Men Cartels, which usually represent the last act of a lengthy process towards concentration, or the end of a patent or price war within a certain industry. Prototypes of this kind of cartels are found in the electrical and chemical industries.

(3) Mere understandings between firms or combines in neighboring countries with regard to territory to be allotted to each.

(4) International governmental schemes for the regulation of raw materials (rubber, tin, tea, sugar). In these cases governments appear as cartel members and the carrying out of the agreement is governed by the domestic laws in each participating state.

[3] See Kirsh-Shapiro, TRADE ASSOCIATIONS IN LAW AND BUSINESS, 1938, p. 321 ff.

(5) A peculiar type of organization is presented by the so-called profit pools, among which the Continental Linoleum Union is the outstanding example. The first combination of this type was the pool between the British Nobel Trust and the German group of gunpowder manufacturers in 1889. This pooling contract included an arbitration clause in a very rudimentary form, according to which all differences arising "directly or indirectly" out of the contract were to be submitted to arbitration. Two arbitration courts were provided for, one in Germany, in case the difference resulted in a claim of the British company against the German group; the other in England, in case the trust company was the defendant. Such alternate arbitration clauses are frequently found also in cases of Two-Men Cartels, and in many instances the arbitration board which is to decide disputes between the two national cartels is one existing or to be formed in a third neutral country. Thus, the agreement between the American Sulphur Export Association and the Italian Sulphur Cartel provides for an English arbitration tribunal. Dutch, German and Hungarian Combines[4] in the electrical industry which have entered into many patent combinations and price cartels, submit all disputes to a Swiss Arbitration Court and their contracts are governed by Swiss Law.

It is for the same reason that many of the "protagonists", as mentioned above, have chosen Switzerland as domicile of their headquarters and have a permanent arbitration tribunal there. The Swiss law appears to be particularly suited to this purpose. The Swiss Code, like the German Code and the old Austrian Code (which, by the way, was also in force in Czechoslovakia) provides for just those forms of associations and partnerships which comply with the necessities of cartelization. More particularly, these Codes have provision for the organization of non-profit-making, unincorporated associations. There are no such provisions in the sphere of the Code Napoléon (France, Italy, Holland) or in England. That this difference in structure may lead to important practical differences is strikingly illustrated by the two well known arbitration proceedings concerning the Radio Corporation of America.[5] In both these cases, it will be recalled,

[4] The term "combine" means a union of enterprises, which remain legally independent, into a single unit for the purposes of productive technique, marketing, administration and finance (Holding Companies, Voting Trusts, etc.).

[5] Cf. with regard to these cases, I ARBITRATION JOURNAL 372.

the question submitted to arbitration was whether an agreement for communication of commercial news between the R. C. A. and the Czechoslovakian government, and a similar agreement between the R. C. A. and the Chinese government, prevented the respective governments from entering into a similar agreement with another radio company. In the Czechoslovakian case, which was governed by the old Austrian law, the arbitration court held for R. C. A. on the ground, among others, that a "community of interests" was created by the agreement under which the negative obligation existed for each contracting party under the Austrian Code to do nothing prejudicial to the interest of such community. In the Chinese case, on the other hand, the arbitration court reached a contrary conclusion, on the theory that there did not exist in that case a non-profit-seeking co-partnership.[6]

With this background, let us now consider some special problems which frequently arise in connection with international cartels:

(1) *Arbitration and Appraisal; Function of "Neutrals".* The well-known distinction between an award and an appraisal is, to a large extent, disregarded or ignored in the field of international cartels. Frequently the "adequate" price of merchandise or of a lease or a royalty is to be fixed; or the amount of damage is to be assessed. In Two-Men Cartels, a "neutral" is frequently empowered to fix prices in the event that the parties do not agree; in this case the decision must be considered an appraisal. On the other hand, in the case of cartels with numerous members, the "price board" fixes the prices and selling terms, which determination is not an appraisal proper, but rather a resolution by an organ of the Association; whether or not such determination may be impeached is a matter of regulation in the by-laws. In some instances the arbitration board, which is organized for deciding all disputes arising under the contract, has to determine, too, the price. For instance, the Incandescent Lamp Cartel provides for a complete exchange of inventions and experiences and mutual use of patents for adequate royalties; what constitutes adequate royalty is to be decided, in case of dispute, by the permanent arbitration court of the Phoebus Cartel.

[6] See AMERICAN JOURNAL OF INTERNATIONAL LAW, 1936 p. 523 ff. and 535 ff.

Different again is the function of the so-called neutral. As cartel contracts must be flexible and elastic and must be adjusted to changing market conditions, the functions of such neutrals are very important and frequently start even before the final cartel agreement is entered into. The most intricate problem in the creation of the cartel usually is an agreement on the quota; should an agreement thereupon not be reached, the neutral has to determine the quota. The neutral also acts to alter the contract and to adjust it to shifts in the market situation.[7]

An example of how the functions of an arbitration board, an appraiser and a neutral may be *united* is offered by the so-called Rayon Pact of 1930. The international rayon selling cartel, of which German, Dutch, French, Italian and Swiss firms are members, negotiated an agreement with the leading groups of the German rayon manufacturing industry. The latter undertook to purchase 90 per cent of their demands for rayon from the producers' cartel, which was, on its part, obligated to calculate and determine the "world market price". The arbitration board which was provided for in the agreement was empowered to decide all disputes arising thereunder (*arbitration*), to fix the world market price (*appraisal*), to decide whether the manufacturing groups had violated their obligations (*arbitration*), and to take the necessary measures in case the producers' cartel was not in a position to supply the contractual quantities and qualities (*neutral*).

The French government introduced a protective tariff to prevent German and Czech firms from selling porcelain in France at prices below those asked by the French producers. The government, however, agreed to reduce the tariff in case the foreign competitors sold at certain minimum prices on an equal basis with the French manufacturers and an arbitration board was created in order to determine whether the price limitations were actually carried out. If the Board found such a violation, the French party was permitted to withdraw from the agreement.

(2) *Permanent Arbitration Tribunals or ad hoc Arbitration Boards.* Generally speaking, it is more advantageous in the field of international cartels to have permanent arbitration boards,

[7] See H. Friedlaender, DIE RECHTSPRAXIS DER KARTELLE UND KONZERNE IN EUROPA. Zuerich, *Polygraphischer Verlag*, 1938, p. 37 and Ascarelli, RIVISTA DI DIRITTO COMMERCIALE, 1935 I, p. 173.

particularly where the cartel has a large membership. Frequently, disputes with regard to such cartels do not only concern the interests and rights of the parties to the proceeding, but also the interests of all members, or of at least a certain group of the members. It is a fundamental principle of cartel law that all members or members belonging to the same group are entitled to equal treatment. Quotas must be calculated on a uniform basis for all, for example, on the basis of the average amount of sales of "cartel goods" within the "reference period". Questions of interpretation of the agreement also may involve vital interests of other members. It is essential for the same reason to define clearly in the agreement such terms as "cartel goods", "substituted goods", etc. A permanent board with carefully circumscribed jurisdiction and powers is provided for, for example, in the contracts of the members of the Incandescent Lamp Cartel. Under these agreements, the clerk of the tribunal notifies each member of the cartel of any complaint filed with the arbitration board. Each member of the cartel is entitled to intervene in a pending proceeding and the general counsel for the cartel may appear in the case if the outcome of the dispute concerns not only the particular defendant, but other members as well.

Another advantage of the permanent arbitration board is that its members either are experts in the field from the beginning or become such in the course of time. Moreover, difficulties in the appointment of arbitrators for each individual case, which so often prove cumbersome, are avoided. It is, of course, always possible for the parties to agree to an *ad hoc* arbitration board in place of the permanent arbitration tribunal.

In order to function, a permanent arbitration board requires a carefully worked out machinery for the appointment of arbitrators. There exist, of course, various methods. The most simple, but probably the most satisfactory, method in cases of cartels with numerous members, is to have the chairman of the board appointed by the "general meeting" of the cartel and to have the other two arbitrators appointed by the chairman thus selected. In other cases the agreement provides for the creation of a panel of persons belonging to various professions (lawyers, accountants, engineers, industrialists, etc.); to this panel are added, from time to time, a number of persons, usually three, who are called trustees and who have not the functions of arbi-

trators. Such a board of trustees elects arbitrators who seem best qualified for the individual case.

(3) *Scope of the Arbitration Clause.* The usual clause simply provides that

> "Any controversy or claim arising out of or relating to this contract or the breach thereof shall be settled by arbitration."

But frequently we find much more comprehensive clauses as, for instance, in the contract of an international Three-Men Cartel in the electrical industry.[8] In the case of international cartels, terms such as "in connection with", "relating to", or "directly or indirectly" often cause difficulty, as the members, which usually are combines with far-reaching inter-relations with other industries, are frequently partners to many cartels. They may, for instance, have entered into cross-license agreements which are to some extent "connected" with the cartel agreement. The machinery of the permanent arbitration board under one cartel is frequently not suitable for cases arising under other cartel agreements, so that it is essential to circumscribe the scope of the individual arbitration clause as precisely as possible.

Another question which demands clarification concerns internal disputes between members. Typical is the following set of facts:

The largest two members of an international cartel guarantee a third member, a small firm, a certain amount of output and further agree upon a special calculation of their respective quotas. If a dispute arises out of such understanding (which may be secret), such a controversy is "connected" with the general cartel agreement so that such dispute comes within the general arbitration clause.

(4) *Jurisdictional Questions.* Occasionally the agreement itself provides, as, for instance, several shipping pool agreements, that the arbitration board itself has to determine whether the claim before it comes within the terms of the agreement. While the

[8] The clause in that instance included: "disputes on the validity of the contracts, their legal and substantial construction in general, the scope and the construction of any contractual obligation and, after all, any matter of whatever kind which is directly or indirectly connected with the contracts." (See Internationales Jahrbuch fuer Schiedsgerichtswesen III p. 218).

validity of such clauses is sometimes doubted, it must be recalled that the peculiar problems facing international cartels demand that the arbitrators be given power to decide the scope of their own jurisdiction. The entire complicated mechanism would be useless if a party could too easily delay the proceeding by denying the jurisdiction of the board. The same is true of questions concerning the validity and existence of the cartel agreement embodying the arbitration clause. Many complicated jurisdictional questions constantly arise in this regard, a detailed treatment of which would be beyond the scope of this article.[9] In order to avoid jurisdictional conflicts, some international cartels embody the arbitration clause in a separate agreement and expressly include disputes concerning the validity of the cartel contract therein.

[9] It may be interesting to call attention to the following cases:

In *Monro* v. *Bognor Urban District Council* (1915) 3 K. B. 167, the plaintiff, a contractor, who had concluded a contract with the defendant for the construction of certain works, alleged that he had been induced to enter into this contract by fraudulent misrepresentations. The court held that the dispute was not a dispute "upon or in relation to or in connection with the contract" within the meaning of the arbitration clause.

In *Printing Machinery Company, Ltd.* v. *Linotype and Machinery, Ltd.*, (1912) I, Ch. D. 566, a claim for rectification was held not to be within a reference of "disputes, differences, and questions which might at any time arise touching the construction, meaning and effect of the instrument of which it formed part."

In *Hirji Mulji* v. *Cheong S. S. Co., Ltd.*, (1926) A. C. 497, the court held that a dispute as to whether the doctrine of frustration had terminated a charter-party was not within the terms of the arbitration clause contained in that charter-party.

In none of these cases, however, was there an arbitration clause comprehensive enough to comprise disputes concerning the validity of the underlying contract. With regard to the attitude of the court on this question, cf. particularly the case of *Cheney Bros.* v. *Joroco Dresses, Inc.*, (245 N.Y. 375, 157 N.E. 272 (1927), criticized by Professor Wesley A. Sturges, 36 YALE LAW JOURNAL p. 866, 1926. Sturges rightly points out that it would require some convincing reason why the issue of fraudulent inducement should be taken from the arbitrators when the parties have not specifically so provided in their arbitration agreement. Cf. also in re *Allentown Silk Co., Inc.* v. *Advance Silk Corp.* (Sup. Ct., Spec. Term, Pt. I, N.Y.L.J., September 30, 1936, p. 928), where it was held that the arbitration clause, providing that "all controversies arising out of or in relation to the contract shall be settled by arbitration", was broad enough to justify a decision by the arbitrators on the merits of the case including the issue of fraud.

COMMENCEMENT OF ARBITRATION PROCEEDINGS WITHOUT A COURT ORDER

1939 AMENDMENT OF CIVIL PRACTICE ACT, §1458, SUBD. 2

BY

H. H. NORDLINGER *

SINCE the enactment by the New York Legislature in 1920 of the first modern arbitration statute, the most vexing problems of arbitration practice have been those involved in the commencement of arbitration proceedings without a court order. Of course, where both parties cooperate, these problems cause no difficulty. But in the situation (which unfortunately sometimes arises in private, as it does in international affairs) where two parties agree in advance to submit their differences to arbitration, but one of them changes his mind when a dispute actually arises, they must be met.

Under the original provisions of the Arbitration Law of 1920, the Court of Appeals solved this problem by holding that where one party refused to proceed with the arbitration, no arbitration could validly be held without first obtaining a court order directing that the arbitration proceed (*Matter of Bullard* v. *Grace Co.*, 240 N. Y. 388).

This solution had the merit of simplicity; but it raised difficulties, well stated by Cardozo, Ch. J., in *Finsilver, Still & Moss, Inc.* v. *Goldberg Maas & Co. Inc.* (253 N. Y. 382, 387), as follows:

> "The Arbitration Law of this State, as first enacted in 1920 (Cons. Laws, ch. 72), declared agreements for the arbitration of future differences to be valid and irrevocable, but did not set up any machinery whereby an award would be effective in the absence of an order that arbitration should proceed (Arbitration Law, § 3; *Matter of Bullard* v. *Grace Co.*, 240 N. Y. 388). The workings of the statute were thought to have disclosed inconveniences as a result of that omission. Thus, where one of three arbitrators withdrew before the proofs had been submitted, there was need of a new order to give validity to the proceeding continued by the others (*Matter of Bullard* v. *Grace Co., supra*). Still more hapless was the plight of a party to a controversy if his adversary was a non-resident, without the jurisdiction. The process of the court could not reach the recalcitrant opponent to coerce response to a petition that the arbitration should proceed. In a much litigated case, a claimant so situated tried the experiment of an arbitration without

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preliminary judicial sanction. The adverse party, resident in England, was notified of the proceeding, but refused to have a part in it, and later contested the jurisdiction when sued on the award abroad. On the authority of our decision in *Matter of Bullard* v. *Grace Co.* (*supra*), the House of Lords decided that the award was ineffective, though declaring at the same time that according to its own view of the law and the practice in Great Britain, an antecedent order was not an indispensable condition (*Liverpool Marine & Gen. Ins. Co., Ltd.* v. *Bankers & Shippers Ins. Co.*, Jan. 29, 1926, reported in 24 Ll. L. Rep. 85, H. L., reversing a decision of the Court of Appeal reported in the New York Law Journal of March 4, 1925, *sub. nom. Bankers & Shippers Ins. Co.* v. *Liverpool Marine & Gen. Ins. Co., Ltd.*, cf. *Matter of Bullard* v. *Grace Co., supra*, p. 396.)"

Accordingly, in 1927 the Arbitration Law was amended by the addition of a new Section 4-a, which provided in effect that where arbitration proceedings were conducted in accordance with a valid arbitration agreement or submission, even without a previous court order directing that arbitration proceed, the resulting award should have full validity.

This provision, however, raised new questions. The regularly constituted tribunals for the adjudication of disputes are the courts; and a party cannot be compelled to submit to arbitration unless he has at some time agreed to do so. Consequently, a party who claims that he has never agreed to arbitrate has an absolute right to litigate that issue at some stage of the proceedings and, indeed, has a constitutional right to a trial by jury upon it.

This difficulty the draftsman of Section 4-a endeavored to meet by the following provisions:

". . . . At any time before a final judgment shall have been given in proceedings to enforce any such award whether in the courts of the state of New York, or elsewhere, any party to the arbitration who has not participated therein may apply to the Supreme Court, or a judge thereof, to have all or any of the issues hereinafter mentioned determined, and if, upon any such application the court, or a judge thereof, or a jury, if one be demanded, shall determine that no written contract providing for arbitration was made, or submission entered into, as the case may be, or, that such party was not in default by failing to comply with the terms thereof, or that the arbitrator, arbitrators and, or umpire was, or were not appointed or did not act, pursuant to the written contract, then and in any such case, the award shall thereupon become invalid and unenforceable. Where any such application is made any party may demand a jury trial of all or any of such issues, and if such a demand be made, the court or a judge thereof shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action."

The apparent effect of these provisions was well stated by the majority of the Appellate Division in *Matter of Finsilver, Still & Moss, Inc.* v. *Goldberg Maas & Co. Inc.* (227 App. Div. 90, 92) as follows:

> "Under this statute a party who disputes the existence of a contract providing for arbitration must make an election at his peril. He may appear before the arbitrators and be heard, but if he does, he is finally estopped from questioning the jurisdiction of the arbitrators and from asserting that he never agreed to be bound by their determination. He may question their jurisdiction to make the award, but only if he foregoes the opportunity to present his side of the controversy to the arbitrators. . . . ."

The Appellate Division held in the case cited that the necessity of making this choice rendered the provision unconstitutional.

The Court of Appeals, in reversing the decision of the Appellate Division just referred to (253 N. Y. 382, cited *supra*), did not rule on the question whether the section, if construed in accordance with its literal provisions, as the Appellate Division had construed it, would have been constitutional. Instead, the Court of Appeals held that, by implication (though not by the express terms of the section), a party claiming that he had never made an agreement to arbitrate had the right, after seasonable protest, to participate in the arbitration, thereby saving both his right to contest the case on the merits and his right later to claim that there had never been a valid agreement to arbitrate. As so construed, the statute was held to be clearly constitutional.

This decision had the advantage of sustaining the constitutionality of the act, but in its turn it raised new difficulties. An unwilling party having knowledge of this decision could save his right to question the existence of an arbitration agreement and then go in and defend on the merits. If he won on the merits, this was the end of the case. If he lost on the merits, he could still litigate the existence of an arbitration agreement. Essentially, his position was "Heads I win, tails you lose."

To avoid what seemed to it the injustice of this result, the Special Committee on Arbitration of the Association of the Bar of the City of New York, in preparing the general revision and consolidation of the New York statutes relating to arbitration, which was enacted into law as Chap. 341 of the Laws of 1937, sought to deal with this difficulty by including a provision (Civil Practice Act, § 1458, subd. 2) following the general scheme of

Section 4-a, but providing that a party served personally with a notice of intention to proceed with an arbitration must move within ten days after such personal service to stay the arbitration or be thereafter barred from questioning the noticing party's right to arbitrate.[1]

It was hoped that this provision would put at rest the long controversy which had raged about this particular feature of arbitration procedure. Unfortunately, however, the provision raised still a new difficulty.

In *Schafran & Finkel* v. *Lowenstein* (254 App. Div. 218; 280 N. Y. 164), the complaint alleged that the plaintiff, who (it was alleged) had never made any agreement whatever to arbitrate, was served by the defendant with a notice of intention to conduct an arbitration; that the defendant had proceeded to conduct an *ex parte* arbitration resulting in an award in its favor and had brought a proceeding to confirm the award; and that the plaintiff was thus being deprived of property without due process of law. The complaint prayed a declaratory judgment and an injunction against proceedings on the award.

The majority of the Appellate Division, although recognizing the possibility of injustice in such a situation, held the action barred by Section 1458, subd. 2, of the Civil Practice Act. Mr. Justice Dore, writing for the majority of the Appellate Division, suggested (254 App. Div. at page 221) that the statute might well require the notice to state that the consequence of ignoring it for 10 days was thereafter to bar the party served from questioning the noticing party's right to an arbitration. He held, nevertheless, that the statute was constitutional without such a requirement and that the complaint therefore did not state a cause of action.

The Court of Appeals, however, speaking unanimously through Chief Judge Crane, held that without such a requirement the statute was unconstitutional (280 N. Y. 164, *supra*) and sustained the sufficiency of the complaint.

In *Matter of Bernson Silk Mills* v. *Siegel & Co. Inc.* (256 App. Div. 617), the Appellate Division of this Department, on the authority of the *Schafran* case, apparently went even further and

[1] This revision is discussed generally in Vol. 1 of this JOURNAL at pp. 100 *et seq.* The particular provision referred to above is discussed at pp. 103 *et seq.*

held a notice ineffectual as a bar, even where it contained a full statement of the consequence of ignoring it.

As a result of the situation developed in the *Schafran & Finkel* case and of Justice Dore's suggestion, the Special Committee prepared a further amendment of Section 1458, subd. 2, which was enacted into law by Chapter 573 of the Laws of 1939. It added the following sentence to the section:

> "Such notice must state in substance that unless within 10 days after its service, the party served therewith shall serve a notice of motion to stay the arbitration, he shall thereafter be barred from putting in issue the making of the contract or submission or the failure to comply therewith."

This amendment, which in substance follows Justice Dore's suggestion, would seem to obviate any possibility of injustice and to make the section clearly constitutional, while preserving whatever benefits there were in the previous attempt to reconcile the conflicting considerations involved in the problem under discussion. The foregoing recital shows that that problem is one of unusual difficulty. It is confidently hoped that a satisfactory solution for it has now been found.

REVIEW OF COURT DECISIONS

BY

WALTER J. DERENBERG

NEW YORK COURT OF APPEALS

Industrial Arbitration—Scope of Arbitrator's Jurisdiction. Appeal from an order granting a motion for an injunction to restrain the Affiliated Restaurateurs, Inc. and the Union Local No. 302 from submitting a dispute to arbitration. The petitioner, President Self-Service, Inc., operates a cafeteria known as the "42nd Street Cafeteria." It is a party to a collective agreement entered into in April, 1938, between the Union Local No. 302 and the Affiliated Restaurateurs, Inc., an association of employers (hereafter referred to as the "association"). Under this collective agreement, the members of the association agreed to employ union labor only. Under paragraph "13", a Board of Adjustment was provided to decide "any disputes that may arise under the terms of this agreement". It was claimed by the Association and the Union that President Self-Service, Inc., owned the 42nd Street Cafeteria and completely dominated Cortlandt Cafeteria, Inc., the stockholders and directors of both corporations being substantially the same and the operation of both stores being under interlocking management. They demanded that Cortlandt Cafeteria, Inc., be compelled to employ union

labor and proceeded to submit to arbitration the issue whether or not the Cortlandt Cafeteria was covered by the collective agreement of April 26, 1938. President Self-Service, Inc., thereupon sought an injunction to restrain such action and the Appellate Division, by a divided court, granted the motion on the ground that the affidavits did not show that Cortlandt Cafeteria was owned, operated or controlled, directly or indirectly, by the President Self-Service, Inc. *Held*, reversed.

The question presented on this appeal is not whether Cortlandt Cafeteria is, in fact, controlled by the President Self-Service, Inc., but whether this dispute regarding such ownership or control is one which should be submitted to arbitration and is for the arbitrators, and not the courts, to decide. "We, therefore, turn to the agreement which, like every other agreement or contract, is supposed to be binding upon the parties. In other words, has the petitioner agreed with the association and the union that any dispute arising as to ownership or control 'directly or indirectly' shall be submitted to arbitration? The wording of the agreement settles the question."

After quoting several sections of the agreement and emphasizing that the jurisdiction of the Adjustment Board comprised any dispute that might arise under the terms of the agreement, the court summarized its position as follows:

> "The petitioner admits that the paragraph requiring the employment of union labor is binding upon it and the '42nd Street Cafeteria'. It impliedly admits, and in fact must concede, that this paragraph is also binding upon the Cortlandt Street Cafeteria, if it be 'owned, operated or controlled, directly or indirectly' by the petitioner President Self-Service, Inc. Does the petitioner, directly or indirectly, own or control or operate the Cortlandt Street Cafeteria? From the above statement regarding the stockholders, directors and officers of these two corporations a dispute has arisen over this question and the facts indicate that it is a *bona fide* dispute with some justification for the claims of the association and the union. Whether this be so or not, the agreement provides the machinery and the method for settling this dispute. It must be submitted as provided in the agreement to the Board of Adjustment. If this board does not determine the question fairly or the petitioner is not afforded an ample hearing or anything else of consequence goes wrong, then the petitioner may resort to the courts for relief, which will be afforded in a proper case. The granting of the injunction, therefore, was error."

In the Matter of President Self-Service, Inc. v. *Affiliated Restaurateurs, Inc. et al*, 21 N. E. (2d) 188, (May 1939) reversing 9 N. Y. Supp. (2d) 585.

NEW YORK SUPREME COURT—APPELLATE DIVISION

Arbitrator's Power to Issue Subpœna Duces Tecum. Appeal from an order of the Supreme Court denying a motion to vacate a subpœna *duces tecum*. Under a collective agreement of July 12, 1937, between the International Ladies' Garment Workers' Union and the Merchants' Ladies' Garment Association, Inc., by which the Unity Cloak Co., Inc., as a member of the Association, was bound, a permanent impartial chairman was appointed to

arbitrate all disputes arising between members of the Union and the Association. The collective agreement also provided that no member of the Council should enter into partnership or merge with another firm or concern in the industry unless the new firm should assume all accrued obligations to the workers of the constituent concerns. In September, 1938, Unity Cloak Co., Inc., after having been fined for a violation of the agreement, resigned from the Association. The Union thereupon complained to the impartial chairman that Unity Cloak Co., Inc., had continued in business as Sun-Ray Cloak Co., Inc., and that Sun-Ray, being identical with Unity, dealt with non-union contractors in violation of the collective agreement.

Upon this complaint the impartial chairman issued a subpœna *duces tecum* directed to Sun-Ray, commanding that it produce, through its President, "all books and records of the Sun-Ray Cloak Co., Inc., from the date of its formation until the present time. . . .". Sun-Ray moved to vacate this subpœna upon the ground that the arbitrator had no jurisdiction or authority to issue the subpœna against one not a party to the collective agreement. The lower court refused to vacate the subpœna. *Held*, reversed.

> ". . . . we hold that the impartial chairman, acting as arbitrator, when required to adjust a dispute between parties to the collective agreement, has jurisdiction under the statute to issue a subpœna requiring the attendance of any person as a witness, and, in a proper case, a subpœna *duces tecum* for the production of a book or paper by such witness. Appellant urges, however, that there is no authority vested in the arbitrator to issue the subpœna *duces tecum*, because Sun-Ray is not a party to the collective agreement and because it is an independent corporate entity in no way connected with Unity. However, whether Sun-Ray be a party to the collective agreement or not, the law gives the arbitrator the power to issue the process to any one whose testimony is required where, as here, he is called upon to determine a matter in his capacity as arbitrator in relation to which proof may be taken. We think it sufficiently appears that there is a controversy between Union and Unity pending before the arbitrator as to whether, in violation of its agreement, Unity has 'consolidated or merged with Sun-Ray' without the latter having assumed all accrued obligations to the workers. To decide this question as between the Union and Unity, the impartial chairman has full power to hear the matter and to make a decision which is binding upon parties to the agreement. Such a decision, of course, would be controlling upon Unity and upon the Union, but it would not be an adjudication as to Sun-Ray. An arbitrator appointed pursuant to a written agreement to arbitrate has no power to make a valid and binding award against one not a party to the submission or the agreement."

The court further pointed out (Untermyer, J., dissenting in part) that under the circumstances of this case the subpœna should be vacated on the ground that its issuance is not a process of right but is permitted only in the discretion of the court when the books, records and documents to be produced are material and relevant to the issue and they have been described with reasonable precision. The subpœna, therefore, should not have been

issued until the materiality and the necessity for the production of all the records of Sun-Ray should be demonstrated. Should additional facts be adduced before the arbitrator establishing that the case is a proper one for the exercise of his power to require the documentary evidence sought, another subpœna *duces tecum* might be issued at that time. *Application of Sun-Ray Cloak Co., Inc., et al,* 11 N. Y. Supp. (2d) 202, 256 App. Div. 620, First Dept., April 1939.[1]

Industrial Arbitration—Scope of Arbitration Agreement. Appeal from an order confirming an award and from the judgment entered thereon. It is claimed by appellants that the arbitration clause in the employment contract did not permit arbitration of a breach of said contract or of damages, the clause simply providing for arbitration of "any disagreements between the parties concerning the rights or obligations of either in relation to the contract." *Held,* affirmed. The clause provided for arbitration of any disagreement between the parties concerning the rights or obligations of either in relation to the contract. It was the right of complainant to have the contract terminated only for a reason stated therein, and it was the reciprocal obligation of defendants to terminate it only for such a reason. A disagreement between the parties arising over an alleged violation of such right and an alleged disregard of such obligation was within the purview of the arbitration clause; and the awarding of damages, which were liquidated, was necessary to the settlement of the dispute, for which the clause provided. It is of no moment that specific reference was not made in the clause to a breach of the contract, since the language used necessarily included a breach. *Matter of Pierce* v. *Brown Buick Co., Inc.,* App. Div., Sup. Ct., 2nd Dept., N. Y. L. J., April 4, 1939, p. 1542, Lazansky, Hagarty, Johnston, Adel & Taylor, JJ.

Effect of Service of Notice of Intention to Arbitrate under Section 1458, Civil Practice Act. Appeal from an order of the Supreme Court denying petitioner's motion to confirm an award. In December, 1937, M. S. Siegel & Company, Inc., the respondent, placed with Bernson Silk Mills, the petitioner, an order for a quantity of printed silk. The order was oral, but the petitioner alleges that the contract was reduced to writing and a copy delivered to and retained by the respondent. The writing contained a provision for arbitration of all controversies relating to the contract. The silk was delivered on or about January 3, 1938. Subsequently a dispute arose as to the quality of the merchandise and the respondent's obligation to pay for it. The petitioner then demanded arbitration and gave notice of appointment of one Sidney Frankel as his arbitrator. On May 31, 1938, there was personally served on respondent, pursuant to Section 1458, a notice of intention to arbitrate, in which respondent was informed that the matter had been submitted to the Arbitration Bureau of the National Federation of Textiles, Inc., in accordance with the contract, and that petitioner had appointed Frankel as its arbitrator. Subsequently, the respondent having disregarded

[1] For a report of the decision of the lower court, *cf.* 3 ARBITRATION JOURNAL, p. 93, 1939.

all notices and communications with regard to the arbitration, the Federation appointed an arbitrator for respondent and the one thus appointed, in conjunction with petitioner's arbitrator, appointed a third. These three arbitrators rendered an award in favor of petitioner on July 21, 1938. Upon motion to confirm the award, respondent alleged, among other things, that it had never agreed to arbitrate. Petitioner claimed that under Section 1458 respondent was precluded from raising such defense after having failed to move for a stay within ten days after having been personally served with a notice of intention to arbitrate, particularly since the notice here served set forth in full the wording of that particular section of the Civil Practice Act. The lower court accepted the petitioner's argument and confirmed the award. *Held*, reversed.

"The respondent who did not participate in the arbitration proceedings was not deprived of its right to a judicial determination of that issue by the notice served pursuant to Section 1458 of the Civil Practice Act and failure to apply for a stay of the arbitration (*Shafran & Finkel, Inc.*, v. *M. Lowenstein & Sons, Inc.*, 280 N. Y. 164, 19 N. E. (2d) 1006). That issue of fact must be determined by a jury under Section 1450 of the Civil Practice Act. (*Finsilver, Still & Moss* v. *Goldberg, Maas & Co.*, 253 N. Y. 382, 171 N. E. 579, 69 A. L. R. 809)". *Bernson Silk Mills* v. *M. S. Siegel & Co., Inc.*, 11 N. Y. Supp. (2d) 74, 256 App. Div. 617, First Dept., April 6, 1939.[1]

NEW YORK SUPREME COURT—SPECIAL TERM

Industrial Arbitration—No Waiver of Arbitration by Complaint to National Labor Relations Board. Motion to compel arbitration. Petitioner has moved to compel arbitration with regard to the status of an employee who had been refused reinstatement. It is alleged by respondent that the petitioning committee has waived the right of arbitration by previously making a complaint to the National Labor Relations Board upon the same charge which is now made the subject of arbitration. There was, however, no decision by the Board upon the merits. *Held*, motion granted. "This court does not believe that a mere complaint to the Board foreclosed the petitioner of its right to arbitration under this agreement. This is particularly true when the withdrawal of the complaint was not objected to. Boards are not courts of law and the arbitration of a labor dispute should survive a mere complaint to any such board. Arbitration is always better than compulsion in the settlement and adjustment of labor difficulties. The ruling of the court is that there has been no waiver in this case." *Steel Workers Organizing Committee* v. *Art Steel Co., Inc.*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., April 3, 1939, p. 1514, McLaughlin, J.

[1] A motion for reargument on the ground that the notice served in this case, contrary to that served in the *Shafran & Finkel* case, referred to in the above opinion and reported in 3 ARBITRATION JOURNAL, p. 194, satisfied the requirements set forth by the Court of Appeals in the *Shafran* case was denied by the Appellate Division. Since the decision was handed down, an amendment to Section 1458 has become effective whereby a contrary decision may be expected on the issue raised in the principal case. With regard to this amendment, *cf.* note by H. H. Nordlinger in this issue at p. 279.

Industrial Arbitration—Mediation as Condition Precedent to Enforcement of Arbitration. Motion to compel arbitration. The collective agreement in this case provided for arbitration of all differences between the employer and the Union, or any employee, on condition, however, that a conference shall have been had between the shop chairman and the employer and another between the employer and the union representative. The motion papers do not disclose that such a conference has been had in this case. *Held*, motion denied without prejudice, on the ground that the holding of such conferences was made an express condition precedent to the enforcement of the arbitration clause. The moving papers fail to allege that these preliminary conferences have been had or that respondent has prevented the holding of such conferences. *Barkin* v. *Cohen*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., May 17, 1939, p. 2271, Valente, J.

Consolidation of Two Arbitration Proceedings in the Absence of Privity Between Parties. Motion to consolidate two arbitration proceedings. The Borea Contracting Company, as subcontractor for painting work, served a demand for arbitration upon the contractor, Cauldwell-Wingate Company, whereupon both parties agreed to submit their differences to one designated arbitrator. When it became apparent that various items of alleged damage were caused by other subcontractors, a motion was made by the contractor to compel the other subcontractors to submit to arbitration in the proceeding instituted by respondent Borea against the contractor. This motion was opposed by respondent Borea on the ground that there was no privity of contract between it and the other subcontractors and that the issues between the contractor and the other subcontractors should not be determined in the proceeding instituted by it against the contractor. The contractor's motion to bring in the other subcontractors was subsequently denied in Special Term on the ground that there was no authority in the Civil Practice Act for the granting of such a motion. Thereupon the other subcontractors entered into a submission agreement with the contractor appointing the same arbitrator who had been nominated in the Borea proceeding. The contractor then made this motion under Sections 96 and 1459, Civil Practice Act, for consolidation of the various arbitration proceedings. *Held*, motion granted.

"Each of the two arbitrations sought to be consolidated is a special proceeding (Section 1459, C. P. A.). Special proceedings may be consolidated under the same circumstances as actions; that is, whenever it can be done without prejudice to a substantial right (Section 96, C. P. A.). If the present proceedings before the same arbitrator were actions to be tried by the court, an order of consolidation would be proper, and the court sees no good reason for denying the present application to consolidate the special proceedings. No prejudice to Borea Contracting Co., Inc., will exist merely because the claims of the movant against other subcontractors will be heard before the same arbitrator as part of the consolidated proceeding. The claim that the order of Mr. Justice McCook is *res adjudicata*, requiring a denial of the present application, appears to be without merit, since the application before Mr. Justice McCook was not one for an order of consolidation, but rather an application to compel the other subcontractors to submit their

disputes to arbitration in the proceeding then pending between Borea Contracting Co., Inc., and the movant." *Borea* v. *Cauldwell-Wingate Co.*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., June 1, 1939, p. 2517, Valente, J.

Arbitrator's Power to Issue Subpœna Against Third Persons. Motion to vacate subpœna *duces tecum* on the ground that the arbitrator had no power to issue the subpœna against a third party. *Held*, motion denied, upon the authority of *Matter of Sun-Ray Cloak Co., Inc.*, (11 N. Y. S. (2d) 202) reported in full in this issue at p. 284. It was held in that case that a subpœna could be issued for the examination of any other person who would testify as to the relationship between certain members of a corporation or parties to a collective agreement. Where it can be shown that the questions which the witness is requested to answer are pertinent to the controversy and have an important and direct bearing on the nature of the relationship between the two corporations involved, the subpœna is properly issued and will not be vacated. *Ashbes* v. *Grodsky*, Sup. Ct., Spec. Term, Pt. I, N. Y. L. J., May 20, 1939, p. 2334, Rosenman, J.

SUPREME COURT OF KANSAS

No Excess of Authority of Arbitrators by Delegation of Powers if Delegation Authorized in Submission—Effect of Unverified Motion to Vacate an Award. Proceeding to vacate an award. An arbitration had been had between the City of Emporia, Kansas, and a contractor engaged by the City to construct a dam. The proceedings were conducted under the Kansas law relating to arbitration. Not only did the construction contract contain an arbitration clause, but the parties also entered into a special "agreement of submission to arbitration" providing that the controversy be submitted "in accordance with the provisions for arbitration . . . . in accordance with the laws of the State of Kansas. . . . ." The parties also agreed to make this submission to arbitration "a rule of the District Court of Lyon County, Kansas." Both the City and the contractor appointed one arbitrator and the two thus appointed selected a third. The submission agreement recited that a controversy had arisen "over certain claims made by the contractor" for extras consisting of fifteen separate items, most of which were allowed by the arbitrators. In its motion to set aside the award, the City urged, among other reasons, that the award had been illegally made, that the Board had illegally received evidence and that it had violated the terms of the submission agreement and the construction contract. The lower court denied the motion to vacate the award. *Held*, modified as to one item and otherwise affirmed. An award rendered under the Kansas State Statute can be set aside only upon grounds stated in the statute. Said statute mentions only three grounds for vacating an award, namely (1) legal defects; (2) fraud, corruption or undue means; (3) misbehavior of the arbitrators.

After pointing out that the evidence did not justify the charges of fraud, corruption or misbehavior, the court proceeds to consider the main objection of the City, namely, a charge that the Board had exceeded its authority by delegating some of its responsibility to others whose findings were not made available to the City. The Board in its report made the following statement

which furnished the grounds of the City's attack: "The Board employed the firm of —— to check all calculations on quantities submitted by the contractor and by the City and to make a report to the Board thereon. These calculations and reports were checked personally by Mr. "S" who has a long record as engineer. . . . . The Board has made its findings based on a consideration of all these things. . . . ." The court, however, held this objection to be unfounded in view of the language of the arbitration agreement, which expressly provided that the Board should have power "to employ an engineer, stenographer or such other help as it may consider necessary in order properly to determine the matters considered."

With regard to the contractor's contention that the court was without jurisdiction to set aside the award because the motion to vacate the award was not verified, the court held that, no attack having been made on the motion at the hearing, it was now too late to raise the question of verification for the first time on appeal and if the acceptance of the unverified award was error, it was harmless error which should not lead to a reversal of the lower court's decision. *Gillioz* v. *City of Emporia*, 88 Pac. (2d), 1014, Sup. Ct. of Kansas, April 1939.

SUPREME COURT OF PENNSYLVANIA

Statutory Method of Enforcing Awards Not Exclusive but Cumulative—Validity of Majority Awards under the Common Law. Appeal from a directed verdict in a suit brought on an award and from a judgment entered thereon. The parties, partners in business, submitted their disputes to a committee of three arbitrators, only two of whom signed an award in favor of the plaintiff. Defendant resisted payment of the award. Plaintiff, however, did not bring a motion to confirm the award under the Pennsylvania Arbitration Act of 1927, but brought suit on the award on the theory that the statutory remedy was not exclusive. *Held*, judgment affirmed. The reference to arbitration was properly regarded as having been made under the common law. The statute did not abrogate common law arbitration; it provides a more effective remedy which is cumulative, not exclusive.

"There is no merit", the Court said, "in the defendant's contention that a majority award, while recognized under the statute, is invalid under the common law. . . . . Even at common law, if the parties in their reference manifest an intent to be bound by a majority of the arbitrators, their express or implied agreement to that effect is binding." The articles of partnership in this case provided that "any disputes should be submitted to a committee of three arbitrators, one selected by each of the parties and a third disinterested party selected by the two disputees.

"This scheme evidently contemplated that two of the arbitrators would be partisan and in accordance therewith the parties agreed, in writing, to submit their disputes to three named persons, one of these being the attorney for plaintiff and the other the attorney for defendant, the decision of this committee to be final . . . . obviously, all three members of such a committee could not have been expected to agree to an award, it being scarcely conceivable that either attorney would decide adversely to his

client. . . . . Clearly, therefore, the submission must have contemplated an award by only two of the arbitrators." *Sukonik* v. *Shapiro*, 5 Atl. (2d) 108, Sup. Ct. of Pa., March, 1939.

U. S. CIRCUIT COURT OF APPEALS—SECOND CIRCUIT

In Admiralty

Instituting of Limited Liability Proceedings as Waiver of Arbitration. Appeal from an order by the District Court granting a motion for a stay of an action brought here, pending arbitration in London.[1] The steamship "Quarrington Court" sank in the Red Sea in December, 1937, and with her cargo became a total loss. She was operated under a charter party containing an arbitration clause providing for arbitration in London. The owner of the lost cargo sued both the owner and the charterer of the vessel *in personam* and the charterer impleaded the owner, claiming that if it was held liable for the loss of the cargo, it would have a claim over and against the owner under the provisions of the charter party. The owner thereupon filed a petition for limitation of liability pursuant to R. S. 4283-4285, 46 U. S. C. A. 181-195, and subsequently amended this petition by demanding that in case the charterer filed a claim in this proceeding, all proceedings should be stayed pending arbitration in London. When the charterer actually filed such a claim in the limitation proceedings, the petitioner moved for a stay pending arbitration. It was alleged by respondent that by instituting limited liability proceedings, the petitioner had waived the arbitration provision. The District Court held that the owner was not in default in proceeding with arbitration and that the motion for a stay should be granted. *Held*, reversed.

"The purpose of a limitation proceeding is not merely to limit liability but to bring all claims into concourse and settle every dispute in one action. The district judge thought the resort to arbitration of disputes between the owner and charterer differs little from a settlement between one claimant and an owner who is left to fight out the merits in the courts with the other claimants. It seems to us that the difference is great. An owner may defend an independent suit brought against him before a limitation proceeding is begun, or may compromise a claim under like circumstances, and still require all claimants to establish their rights in the limitation proceeding. Court Line chose to begin the proceeding for exoneration or limitation of liability and Isthmian filed its claim therein. Thus Court Line invoked the remedies of the limitation statute before attempting to resort to arbitration. It might have stayed Isthmian under Section 3 of the Arbitration Act, (*Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, 55 S. Ct. 313, 79 L. Ed. 583), but, had it done so, would have been subject to suit by the cargo owners and underwriters. After seeking to limit liability with respect to all claimants, including Isthmian, it cannot be allowed to try the cargo claims in the admiralty court and those of Isthmian before the arbitrators in England. The proctors for Court Line suggest that

[1] The decision of the lower court was discussed in a note by Prof. George C. Sprague in 3 Arbitration Journal, p. 88.

the arbitrators may determine the right to limit as well as the amount of Isthmian's claims. Such a determination should not be allowed outside of the limitation proceeding, particularly at the instance of an owner who invoked the proceeding for its own benefit. Court Line having invoked the admiralty procedure, when it might have resorted to arbitration, ought not to be allowed to abandon its position and to have its disputes determined in different tribunals." *The Quarrington Court. Petition of Court Line, Limited*, 102 Fed. Rep. (2d) 916, C. C. A. II, March, 1939.

Settlement Agreement in Limitation Proceeding is "Arbitration Agreement" and Subject to Review as Such—Partiality of Arbitrators in Rendering Several Awards under a Settlement Agreement Vitiates Remaining Awards. Appeal from a decree in admiralty denying the application of claimants to vacate or reduce awards made to certain other claimants. After the sinking of the steamship "Morro Castle" in September, 1934, off the New Jersey coast, the owner and charterer of the ship filed a joint limitation proceeding which terminated in a settlement, according to which the owner and charterer agreed to pay the sum of $890,000 into a trust fund to be known as the "Morro Castle Fund"; the owner and charterer were to be discharged by such payment from any further claims for indemnification. Under this settlement, a committee of five proctors of the largest claimants was appointed, which all claimants authorized "to act for them . . . . in all matters in connection with this settlement . . . . and to arbitrate, agree or otherwise determine the validity and amounts of all claims . . . . and to make distribution of said Morro Castle settlement fund . . . . . All determinations of said committees shall be final and binding . . . . except that any claimant . . . . may appeal . . . . to the full proctors' committee . . . . . Such appeal may be taken only within ten days after the mailing by the committee to the proctor of the claimant . . . . of the notice of the valuation or other determination put upon his claim. . . . . If such appeal is taken the full proctors' committee . . . . may decrease, increase or confirm the valuation or affirm or reverse or modify the determination, and such decision shall be final and binding upon the claimants." The members of both committees were all proctors for claimants to the fund, and therefore acted in a dual capacity, but no member took part in fixing the award of his own client. The committee, after receiving a great deal of evidence, made approximately 400 awards aggregating about $1,400,000, so that the dividend upon each claim was about 60 per cent. After the rendition of these awards the plaintiffs moved that the awards be "rescinded and impartially reviewed", or, if not that, then that some thirty awards be "reviewed and modified by the court on the ground that the majority members of the Morro Castle Committee made such awards unfairly, partially resulting in an inequitable disposition of the settlement fund". It was claimed that the members of the committee had acted with partiality and refused to receive pertinent evidence and that "there was a covert, or perhaps only a half-conscious understanding between the members that the awards to their clients should be disproportionately large". The lower court, after receiving the two committees' answers, denied the motion on the ground that no partiality had been proven. *Held*, reversed and remanded. The first question to be deter-

mined by the court was the nature of the proceeding which ended in the order appealed from. It was argued by the plaintiffs that the settlement was a step in the limitation proceeding and not an independent agreement to arbitrate, so that the court was not limited in its review but should have treated the awards like the report of a master. This contention was rejected by the court. "Even though the settlement were not an independent arbitration, but only an incident in the limitation proceeding, it was still an arbitration, and the judge's powers to review it were governed by Title 9, U. S. Code, 9 U. S. C. A. Admiralty Rule 43½ is plain as to this: when 'any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the commissions or assessors as arbitrators, the court shall review the same only in accordance with the principles governing a review of an award and decision by an arbitrator'. There cannot be the least doubt that the 'submission' here was to the committee 'as arbitrators'; and that concludes the matter, even though in addition they could be regarded as 'commissioners or assessors', which seems somewhat unreal. Nor was it any less an arbitration because of the clause in the committee's rules of procedure that the members might in their discretion consult a judge upon a point of law, and that he should decide any claim upon which they were dead-locked. Whatever would have been the effect of those clauses, had the committee resorted to the judge for either purpose, it did not do so, and the awards were in fact all made by the arbitrators unaided. Hence they can be reviewed only under Title 9 of the U. S. Code, 9 U. S. C. A."

With regard to the alleged partiality, the court held that the issue could not be decided upon affidavits, but should be returned for trial before a judge or a commissioner. "It is essential," said the court, "that the consciences of the arbitrators be searched by cross-examination and that they should be free to defend their conduct. Moreover, their conduct in all cases must be scrutinized to ascertain whether they had varied in the standards they applied." If the plaintiffs should prevail, all of the awards must be vacated and new arbitrators appointed, since otherwise those whose awards were vacated could justly complain that they were subjected to other and probably severer standards of proof than the claims of those whose awards stood. *Hyman et al* v. *Pottberg's Ex'rs et al*, 101 Fed. Rep. (2d) 262, C. C. A. II, January, 1939.

UNITED STATES DISTRICT COURT

Submission to "Competent Court at Rotterdam" Invalid as Ousting the United States Courts of Jurisdiction. Action against the steamship "Edam," N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij, and others. Motion by respondent to dismiss the action or, in the alternative, for a stay of proceedings and a reference of the dispute to a competent judge at Rotterdam for decision. *Held*, motion denied. "The clause upon which the respondents base their request for relief states in part that 'all disputes be submitted to the determination of the competent court at Rotterdam'. The libelant concedes that agreements to arbitrate are valid, but claims that the clause in dispute is of no effect because it is not an arbitration clause,

but rather one which attempts to oust this court of jurisdiction. A long list of authorities have consistently held that agreements to oust the court of jurisdiction are invalid as against public policy. The respondents, on the other hand, urge in support of the validity of this clause, that the parties have agreed in advance upon a certain tribunal, and have, in effect, selected that tribunal as arbitrator of their disputes. I have considered the authorities cited by both sides very carefully and am of the opinion that the clause is not an arbitration clause, but rather one which ousts the court of its jurisdiction, and hence invalid." *Otto C. Hagen Corporation* v. *N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij et al*, 27 Fed. Supp. 8, D. C. S. D. N. Y., 1938.

FOREIGN JURISDICTION

(England) Exclusion of Rules of Law by Contract—Custom—Damages. Upon the arrival of a cargo in London, the sellers tendered documents to the buyers which the latter refused to accept. The contract was subject to the rules of the London Corn Trade Association. Upon an arbitration it was found that the buyers had a right to reject the cargo. The buyers then put forward a further claim for the difference between the contract price of the cargo and the market price at the date when it should have been delivered. It was contended that this claim should have been put forward in the previous arbitration. The award upon the second arbitration, stated in the form of a special case, contained a finding that there was a custom in respect of contracts of the London Corn Trade Association that a claim to reject goods should be limited to rejection and that there was a right to put forward a subsequent claim for damages after the question of rejection had been determined.

Held: (1) the rule that all relief to which a party is entitled under one cause of action shall be claimed in one proceeding did not apply to these arbitrations, since the rule was excluded by the custom, which was a reasonable one and not illegal, and therefore binding. (2) the buyers had no cause of action in damages until there was a breach of contract, and the first tender of documents was not necessarily a breach of contract, since it might have been followed by a subsequent tender to which no proper objection could have been taken.

From the court's opinion, the following language is of especial interest: "When people are making a contract in a particular market, they are held to be bound by any customs of that market which are reasonable and certain, and which are not unlawful. It is plain upon the custom found that the parties, agreeing to go to arbitration under a contract of the London Corn Trade Association, must be taken to have agreed to carry out the arbitration according to the customs of that association, with the limitation, of course, that they would not be bound by any such custom if it were unreasonable or unlawful, and in that sense contrary to the general law."

And again: "In my view, the custom which is alleged—and which is obviously convenient, or it would not have been adopted by an association of business men in a case of this kind—namely, to decide first of all the question as to whether or not a particular parcel of goods is such that it can be

rejected, before going into any question of damages which might arise upon the hypothesis that it can be rejected, and that it cannot be replaced by some other parcel of goods, is a very convenient one, and it seems to me that to apply the doctrine of *res adjudicata*, as it has been applied in some of the cases, to conditions such as those pertaining in these trade arbitrations would be a very serious matter indeed." *E. E. & Brian Smith* (1928) *Ltd.* v. *Wheatsheaf Mills, Ltd.*, 2 All England Law Reports Annotated, 251 (1939), High Court of Justice, K. B. D., Branson, J.